143-192

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1132~~. 779 ~~458~~ 119

THE NEW ORLEANS CITY AND LAKE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED SEPTEMBER 25, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1132.

THE NEW ORLEANS CITY AND LAKE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 26, 1888.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the chief justice and associate justices of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Louisiana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New Orleans City & Lake R. R. Co. (defendant), plaintiff in error, and The City of New Orleans (plaintiff), defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the
b Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The New Orleans City & L. R. R. Co., plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, acting Chief Justice of the said Supreme Court, the 1st day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
E. BERMUDEZ,
Chief Justice Supreme Court of the State of Louisiana.

c [Endorsed:] Supreme Court of La. No. 10174. The New Orleans City & Lake R. R. Company, plaintiff in error, *versus* The City of New Orleans, defendant in error. Writ of error. Supreme court of La. Filed June 9, 1888. Geo. Augustin, d'y clerk.

d THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to The City of New Orleans, defendant in error, through Joseph A. Shakspeare, mayor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a petition & writ of error, filed in the clerk's office of the supreme court of the State of Louisiana, wherein The New Orleans City & Lake R. R. Co. is plaintiff in error and The City of New Orleans defendant in error, said suit being No. 10174 of the docket of said supreme court of Louisiana, to show cause, if any there be, why the judgment rendered against the said New Orleans City & Lake R. R. Co., as in said petition & writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, acting Chief Justice of the Supreme Court of the United States, this 1st day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal Supreme Court of the State of Louisiana.]

E. BERMUDEZ,
Chief Justice Supreme Court of Louisiana.

e [Endorsed:] Supreme court, State of Louisiana. No. 10174. City of New Orleans *vs.* New Orleans City & Lake R. R. Company. Citation. Supreme court of Louisiana. Filed June 9, 1888. George W. Dupre, clerk.

Sheriff's Return.

Received June 9, '88, and on the same day, month, & year I served a copy of the within citation on the City of New Orleans, through Joseph A. Shakspeare, its mayor, by leaving the same at his *of* office, City Hall, in the hands of Bright Schaumburg, his secretary, the said Joseph A. Shakspeare, mayor, being absent from his office at the time of said service.

Returned same day.

PH. PATERNO, *D'y Sh'ff.*

1 *Rule. Filed June* 17, 1887.

Civil District Court, Division "D."

CITY OF NEW ORLEANS
vs.
NEW ORLEANS CITY & LAKE RAILROAD COMPANY. } No. 21536.

On motion of I. W. Patton, treasurer of the city of New Orleans, by Branch K. Miller, as't city attorney, and on suggestion to the court that New Orleans City and Lake Railroad Company conducting the business of carrying on, operating, and running a horse and steam railroad for the transportation — passengers within the limits of said city in said city, without having obtained a license for said business from the city of New Orleans for the year 1887, and that its gross annual receipts in said business for the past year were, and for the present year will be, more than five hundred thousand dollars, and on further suggesting that all persons who conduct any business without a license from the city of New Orleans after the first day of *first* March, 1887, are declared delinquent, and on further suggesting to the court the said New Orleans City and Lake Railroad Co. has not paid to said city the amount of license for carrying on said business for the year 1887, and that under the terms of section 8 of ordinance No. 2035, council series of said city, there is due and owing to said city by said New Orleans City & Lake Railroad Company the sum of two thousand five hundred dollars for a license for carrying on *his* said business for the year 1887:

2 It is ordered that the New Orleans City and Lake Railroad Company do appear and show cause on the tenth day, excluding Sundays and legal holidays, after service hereof, at 11 a. m., why — should not pay two thousand five hundred dollars to the city of New Orleans for a license for the privilege of conducting the above-mentioned business during the year 1887, penalties 10% per annum until paid, and costs of this proceeding, or be restrained from the carrying on of said business until the said license, penalties, fees thereon, and costs of court be paid.

And that City Railroad Company be required to show further why this rule should not be made absolute and judgment rendered in favor of the City of New Orleans for two thousand five hundred dollars, with penalties and costs of court, and the injunction be perpetuated.

Answer to Rule. Filed Sept. 29, '87.

Division "D."

CITY of NEW ORLEANS
vs.
NEW ORLEANS CITY & LAKE R. R. COMPANY. } No. 21536.

And now into this honorable court, through undersigned counsel, comes the defendant, and for answer to the rule of plaintiff denies

all and singular the allegations therein contained, except that it operates street railroads in the city of New Orleans, and that its receipts for the year 1886 exceeded the sum of five hundred thousand dollars.

This respondent now specially avers that it is not indebted unto the city of New Orleans for license for the year of 1886, or any other year, for the reason:

1. That there is no binding and valid law of the state authorizing the city of New Orleans to impose the license herein
3 claimed, for the reason that act No. 101 of the acts of the session of 1886, under which said license is claimed, and all other laws appertaining thereto, in so far as said act No. 101 and preceding acts on the same subject-matter —, purporting to impose a license tax in favor of the State or of the municipal corporation, the city of New Orleans acting under authority of the State Legislature, and especially section 8 of said act, purporting to impose a license tax upon the business of carrying on, operating, or running any horse or steam railroad for the transportation of passengers within any limits of a city or town in this State, is null, void, and unconstitutional, because the license therein imposed is unequal and not graduated in accordance with article 206 of the constitution of 1879, in this, that it provides a difference grade of license for cities having a population of fifty thousand people or less than it does for other cities or portions of the State; that said attempted discrimination is illegal, null, and void, as it does not fall within the permission or the spirit of said article 206 of the constitution of 1879.

Respondent further avers and pleads that even if it should be held that the city ordinances and that law on which they are based are valid, binding, and constitutional the city of New Orleans cannot recover a license tax from this respondent for carrying on its business of operating street railroads in the city of New Orleans, for the reason that said business, as conducted by it, is not a trade, profession, vocation, or calling in the sense in which the license tax is imposed upon such trades, professions, vocations, or callings,
4 but simply the exercise of a privilege accorded to respondent by the city of New Orleans for a valuable consideration to use the public streets or highways of the city of New Orleans for street railroad purposes as a convenience to the inhabitants of the city, transporting them from various points within it for a money consideration; that the grant of said privilege or permission is, on the part of the city of New Orleans, a sovereign and legislative act, by which it establishes the uses to which the public streets within its jurisdiction may be subjected, and no person or persons or corporations, without having previously obtained such permission, can use the streets for such purpose or engage in said business, so called, of operating street railroads; that said privilege was confirmed to respondent by a written contract executed with the New Orleans City Railroad Co. on the 2nd of October, 1879, for a period of twenty-five years, ending on the 1st of January, 1906, and for which respondent paid to the city of New Orleans the sum of six hundred and thirty thousand dollars in cash; and on the 9th of June, 1883,

this respondent, The New Orleans City and Lake Railroad Company, acquired the rights, property, and privileges of the New Orleans City Railroad Company, extinct.

Respondent avers that the ordinance of the city of New Orleans, in so far as it purports to impose a license tax upon this respondent, and the acts of the Legislature, in so far as it purports to authorize the city of New Orleans to such action, so far as it affects this respondent, is null, void, and inoperative, as impairing the obligations of the contracts hereinabove set out, and therefore violative
5 of article 10 of the constitution of Louisiana, section 1 of the 14th amendment of the Constitution of the United States, and section 10 of article 1 of the Constitution of the United States.

That under said contract passed between it and said city respondent acquired a fixed and vested right for the consideration then paid to operate street railways through the particular streets of the city designated therein and for the time therein specified, and the attempt to impose a license tax upon said company is a violation of the letter and spirit of the contract, prohibited by the fundamental principle of right as expressed in the constitutional provisions hereinbefore set forth.

That payments heretofore made were made in error and under this (mis)apprehension of their legal rights under the contract referred to.

Wherefore respondent prays for the dismissal & rejection of mover's demand, with reservation of the rights to sue for recovery of payments of licenses made to the city of New Orleans, and as in duty bound, etc.

(Signed) BRAUGHN, BUCK, DINKELSPIEL & HART, *Att'ys.*

Testimony and Notes Offered in Evidence by Plaintiffs and Defendants. Filed March 9th, 1888.

Civil District Court, Division "D."

CITY OF NEW ORLEANS
vs.
NEW ORLEANS CITY & LAKE RAILROAD COMPANY. } No. 21536.

6 Note of evidence and testimony on behalf of plaintiff, taken in open court, March 9th, 1888.

Present: W. Rogers and Branch K. Miller, for plaintiff; C. F. Buck, for defendant.

Counsel for plaintiff introduces and offers in evidence the ordinance sued on for license for the year 1888.

B. K. MILLER, Esq., sworn for plaintiff.

By Mr. ROGERS:

Q. Do you know the cars of the New Orleans City and Lake Railroad Company?

A. Yes; I know them.

Q. What business are they engaged in?

A. They are engaged in the business of transporting passengers for hire; part of the road being operated by horse-power and part by steam-power.

Q. Within the limits of the city of New Orleans?

A. Yes.

Q. Where do the steam cars run?

A. The steam cars are run out Canal street to the Metairie Ridge and to the lake and back to the city again.

Q. The other cars, run by horse-power, are run where?

A. All I know are the cars on the Magazine-street line, the Camp and Prytania street line, the Levee and Barracks street line, the Esplanade street and Bayou Bridge line, the Canal-street horse line, and the Dauphine and Rampart street line.

Q. Then there is a line called the Ridge line from Metairie Ridge to the Bayou Bridge?

A. Yes.

It is admitted that all the lines mentioned are run by horse-power, except the Canal-street line, which is run by steam-
7 power and by horse-power; it is further admitted that all these lines are owned by the defendant company.

Counsel for plaintiff introduces and offers in evidence the charter of the New Orleans City and Lake Railroad Company.

Cross-examined by Mr. BUCK:

Q. On this steam line running to the lake what is the fare charged by the company?

A. Fifteen cents for the round trip.

Q. Do you know what they charge to the Halfway House—whether they carry passengers for five cents.

A. I think they do.

Q. There is also a system of horse cars running on Canal street besides the steam cars running there?

A. Yes; and the fare charged on the steam cars to any intermediate point is the same as that charged on the horse cars.

It is admitted that the annual receipts of the defendant company are correctly stated in the rule for the purposes of this demand.

Note of evidence on behalf of defendant:

On behalf of the defendant company Mr. Buck introduces and offers in evidence the act passed before W. O. Hart, notary, on the 9th day of June, 1885, and the act of the second of October, 1879, passed before G. Legardeur, notary, being the contract entered into with the city of New Orleans pursuant to ordinance regularly passed by the city council.

It is agreed that the ordinances of the city council leading up to the execution of that contract, as stated in the contract, shall be accepted as authentic without special certification.

8 Mr. Buck, on the part of the defendant company, also introduces and offers in evidence the act passed before W. O. Hart, notary, on the 9th day of June, 1885, and the act of the second of October, 1879, passed before G. Legardeur, notary, being the contract entered into with the city of New Orleans pursuant to ordinance regularly passed by the city council. It is agreed that the ordinances of the city council leading up to the execution of that contract, as stated in the contract, shall be accepted as authentic without special certification.

Mr. Buck, on the part of the defendant company, also introduces and offers in evidence the act of the 9th of June, 1885, wherein the original New Orleans City Railroad Company transfers all its rights, title, and interest to the present corporation, on the act of incorporation of the original City Railroad Company having expired by limitation.

It is understood and agreed that the charter contracts and ordinances offered may be referred to in their original printed form without being copied in the record, and that in case of appeal they may be referred to in the supreme court in the same manner without being copied in the transcript of appeal.

It is admitted that the city of New Orleans has a population of over 50,000 inhabitants, and that there is not another city in the State having a population of fifty thousand.

Judgment.

Civil District Court, Division "D."

CITY OF NEW ORLEANS
vs.
NEW ORLEANS CITY & LAKE RAILROAD COMPANY. } No. 21536.

9 This rule came on this day for trial.

Present: Braughn, Buck, Dinkelspiel & Hart, for defendant in rule; W. H. Rogers, city attorney, and Branch K. Miller, ass't city attorney, for plaintiff in rule.

When, after hearing pleadings, evidence, and counsel and for the reasons orally assigned by the court, the law and evidence being in favor of plaintiff in rule—

It is ordered that the rule filed herein on June 17th, 1887, be made absolute, and accordingly that the New Orleans City & Lake Railroad Company pay to the city of New Orleans the sum of two thousand five hundred dollars for conducting and operating and moving a horse car and steam railroad for the transportation of passengers within the limits of this city for the year 1887, with ten per cent. interest per annum, penalties and costs of court, or in default of paying said above judgment that they, the defendant in rule, be restrained from carrying on said business until the said license, penalties, fees thereon, and costs of court be paid.

Judgment rendered March 9th, 1888.

Judgment signed March 14th, 1888.

(Signed). N. H. RIGHTOR, *Judge.*

Motion of Appeal. Filed Mc'h 15, 1888.

Civil District Court, Division "D."

CITY OF NEW ORLEANS
vs.
NEW ORLEANS CITY & LAKE RAILROAD COMPANY. } No. 21536.

On motion of Braughn, Buck, Dinkelspiel & Hart, attor-
10 neys for defendant, and on suggesting to the court that it is informed and verily believes there is error to its prejudice in the final judgment of this honorable court, rendered March 9th, 1888, and signed March 14th, 1888, against defendant and in favor of plaintiff, and that it is desirous of appealing therefrom:

It is ordered by the court that mover be allowed a suspensive appeal from said judgment, returnable to the honorable the supreme court of the State of Louisiana on the 3rd Monday of March, 1888, upon its furnishing bond in accordance with law.

And for general relief.

Appeal Bond.

Know all men by these presents that we, The New Orleans City and Lake R. R'd Co., as principal, and Joseph A. Walker, as surety, are held and firmly bound unto W. J. McGeehan, clerk of the civil district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of five thousand dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seal and dated in the city of New Orleans on this fifteenth day of March, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-bounden N. O. City and Lake R. R'd Co. has this day filed a motion of appeal from a final judgment rendered against it in the suit of The City of New Orleans *vs.* The N. O. City
and Lake R. R'd Co., No. 21536, of the civil district court for
11 the parish of Orleans, on the 9th day of March, 1888, and signed on the 14th day of March, 1888:

Now, the condition of the above obligation is such that the above-bound N. O. City and Lake R. R'd Co. shall prosecute said suspensive appeal and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal; otherwise that the said Joseph A. Walker, surety, shall be liable in its place.

(Signed) J. A. WALKER, *President.*
(Signed) J. A. WALKER.

Signed, sealed, and delivered in the presence of—
(Signed) W. O. HART.

12 *Certificate.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, W. J. McDonnell, deputy clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing sixteen pages do contain a true, correct, and complete transcript of all the proceedings had, documents filed, testimony, and evidence adduced upon the trial of the cause wherein City of New Orleans is plaintiff and New Orleans City & Lake Railroad Company are defendant, instituted in this court and now in the records thereof under the No. 21536 in the docket of this court.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on the twenty-seventh day of March, in the year of our Lord one thousand eight hundred and eighty-eight, and in the one hundred and twelfth year of the Independence of the United States of America.

(Signed) W. J. McDONNELL, *D'y Clerk.*

13 *Proceedings in Supreme Court of Louisiana.*

Submission.

Extract from the Minutes of Friday, May 11th, 1888.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Rob't B. Todd, Lynn B. Watkins, Chas. E. Fenner, associate justices.

CITY OF NEW ORLEANS
vs.
NEW ORLEANS CITY & LAKE R. R. COMPANY. } No. 10174.

This case was called for trial, and, after argument of counsel—F. B. Lee, assistant city attorney, for plaintiff, and C. F. Buck, for defendant—was submitted.

14 *Final Decree and Opinion. Filed May 23rd, 1888.*

CITY OF NEW ORLEANS
vs.
NEW ORLEANS CITY & LAKE R. R. Co. } No. 10174.

Appeal from the civil district court, parish of Orleans.

Mr. Chief Justice Bermudez pronounced the opinion and decree of the court in the words and figures following, to wit:

Plaintiff sues to recover $2,500 and interest from the defendant as a license for the year 1887 for carrying on within city limits the business of operating and running a horse and steam railway for the transportation of passengers.

The defences are:

First. That act No. 101 of 1886, which authorizes the city to levy the license tax, is unconstitutional, because the license is unequal and not graduated, as is required by article 206 of the constitution, as it provides a different grade for cities, according to their population.

Second. That if this defence is not well founded, then
15 that the license tax cannot be recovered, because the business is not a trade, profession, avocation, or calling in the sense of the law, but is simply the exercise of a privilege accorded for cash consideration to use the streets and highways of the city for street railroad purposes; that the enforcement of the ordinance under which the license is claimed will impair the obligation of the contract entered into in 1879 between the city and the company, and that this impairment violates both the Federal and State constitutions.

I.

The first defence is formally abandoned by the company on consideration of the ruling in State *vs.* O'Hara, 36 A., 94, as settling the question.

II.

In relation to the second defence it may suffice to observe—

First. That the act of 1886 expressly recognizes and declares that carrying on, operating, or running any horse or steam railroad, or both, for the transportation of passengers within the limits of any city, is a business, and that after so saying the act proceeds to graduate the license.

Second. That the privilege conceded by the city, by the contract of 1879 to the company, was intended merely to confer the right to lay rails and do all necessary work on the streets designated, to enable the grantee to exercise the right of way to operate a street railway.

16 From the language of the act it is clear and it follows that the operating of a street railroad is a business, and as such chargeable with a license.

The privilege of the right of way is what is termed a franchise, which, when granted, becomes property susceptible of encumbrance and conveyance. Board *vs.* New Orleans, 32 A., 915; New Orleans *vs.* R. R. Co., 34 A., 1228, and same, 114 U. S., 505.

It is therefore well distinguishable from the privilege of enjoying that right, which is vivified only on the payment of the proper license to the city; under the terms of act 101 of 1886, p. 175 (9th and following class), on which ordinance 2035 C. S., sued under, is made to rest.

It is further clear that, as the contract of 1879 does not grant the privilege of using or exercising the right of way, free from any license, the exaction of one does not impair the obligation of the contract.

The district judge ruled correctly.

Judgment affirmed.

17 *Petition for Writ of Error. Filed June 1st, 1888.*

To the honorable the chief justice of the supreme court of the State of Louisiana:

The petition of the New Orleans City and Lake Railroad Company, herein appearing through Joseph A. Walker, its president, duly authorized in the premises, with respect shows—

That he is informed and believes that there is error to the prejudice of said company in the final judgment herein rendered between The City of New Orleans, plaintiff, and the said New Orleans City and Lake Railroad Co., defendant; that he is desirous of having and prosecuting a writ of error to remove said judgment to the Supreme Court of the United States, which has jurisdiction of the amount in dispute, as herein set forth, to wit, in a sum exceeding ten thousand dollars, and possibly ranging to the amount of one hundred thousand dollars, as follows:

That under the contract which is in controversy between the parties litigant herein said defendant claims immunity from State and city license for the period of said contract, to wit, to the second of October, 1906; that under existing laws, if liable at all, said defendant is liable for said State license in a sum of not less than five thousand dollars and for city license only not less than twenty-five hundred dollars per annum until and inclusive of the year 1906.

And petitioner shows that rights, immunities, and privileges are claimed under the Constitution of the United States, especially article 2, section ten, and 14th amendment of the Constitution of the United States, and that said decision of said supreme

18 court of Louisiana is against the rights, privileges, and immunities specially set up and pleaded herein in defense, and said decision impairs the obligations of the contract with the City of New Orleans, as set forth in the pleadings in this case:

Wherefore petitioner prays that a writ of error be allowed and issue to the honorable the Supreme Court of the United States from said judgment, returnable to the Supreme Court of the United States at its next term, to wit, on the second Monday of October, 1888, and that said writ — operate a supersedeas on petitioner and plaintiff in error, giving bond in a sum to be fixed herein; and petitioner prays that the City of New Orleans be cited to answer said writ in said Supreme Court of the United States on the day and date aforesaid.

And for general relief.

(Signed) BRAUGHN, BUCK, DINKELSPIEL & HART, *Att'ys.*

Affidavit.

The undersigned, Joseph A. Walker, president N. O. C. & L. R. R. Co., duly sworn, deposes and says that the allegations of fact in the foregoing petition contained, especially as to amount of pecuniary interest involved, are true and correct.

(Signed) J. A. WALKER.

Sworn to before me June 1st, 1888.
(Signed) W. O. HART,
Notary Public.

Order of Court.

Writ allowed; plaintiff in error to give bond, with good
19 and solvent surety therein conditioned as the law directs, in double the amount of this judgment in capital, interest, and costs, to operate as a supersedeas.
(Signed) E. BERMUDEZ,
Chief Justice.

20 *Bond for Writ of Error. Filed June* 1, 1888.

Know all men by these presents that we, The New Orleans City & Lake Railroad Company, through Jos. Walker, president, duly authorized —— ——, as principal, —— ——, as surety, are held and firmly bound unto the city of New Orleans in the full and just sum of ten thousand ($10,000) dollars, to be paid to the said city of New Orleans, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately at the supreme court of the State of Louisiana, holding sessions in and for the State of Louisiana, in a suit depending in said supreme court, wherein The City of New Orleans is plaintiff and The N. O. C. & L. R. R. company, defendant, judgment was rendered against said N. O. C. & L. R. R. Co., defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said city of New Orleans, through Jos. A. Shakespeare, mayor, citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

21 Now, the condition of the above obligation is such that if the said New Orleans City & Lake R. R. Company shall prosecute its writ to effect and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—
(Signed) J. A. WALKER,
President of N. O. City & Lake R. R. Co.
(Signed) A. H. SIEWERD.

Approved.
(Signed) E. BERMUDEZ,
Chief Justice.

22 *Agreement. Filed Aug.* 27, 1888.

Supreme Court of the U. S.

CITY OF NEW ORLEANS
vs.
N. O. CITY & LAKE RAILROAD COMPANY. } No. —.

It is agreed between the undersigned—respectively the plaintiff and defendant in this case—that in making the transcript for the writ of error to the Supreme Court the pamphlet now in the record, containing various contracts and the act of incorporation, which have been offered in evidence—some by plaintiff, some by defendant—shall go to the Supreme Court as part of the record in the original; the acts and contracts really forming a part of the record, as per the note of evidence, to be pointed out to the clerk of the Supreme Court of the United States and printed as part of the printed record in said Court, as required by the rules thereof.

It is further agreed that inasmuch as the license ordinance of the city of New Orleans, is a *verbatim et literatim* copy of the State license law, act No. 101 of the Legislature of 1886, that said ordinance shall not be copied into the transcript, but shall be used and referred to as contained in the published acts of the State of Louisiana.

It is further agreed that the letter addressed to the justices of the Supreme Court by counsel for defendant, withdrawing all objection to the constitutionality of the license law, *per se*, shall not be copied in the transcript for writ of error.

8, 21, '88.

(Signed) FRANCIS B. LEE,
Ass't City Att'y, for Plaintiff.
" BRAUGHN, BUCK,
DINKELSPIEL & HART.

23 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

I, George W. Dupre, clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, hereby certify that the foregoing twenty-two (22) pages contain a true and faithful copy of the transcript of the proceedings had in the civil district court for the parish of Orleans, in a certain suit wherein The City of New Orleans was plaintiff and The New Orleans City & Lake Railroad Company was defendant, which said record is now on the files of this court under No. 10174; and also a true copy of all the proceedings had, with exception annotated in an agreement on page 22, in the supreme court on appeal taken by said defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this 5th day of September, 1888, and in the 112th year of the Independence of the United States of America.

[Seal Supreme Court of the State of Louisiana.]

GEORGE W. DUPRE, *Clerk.*

24 *Certificate of Chief Justice (Legalizing Signature of Clerk).*

UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

I, Edward Bermudez, chief justice of the supreme court of the State of Louisiana, hereby certify that George W. Dupre is clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans; that the signature of George W. Dupre to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this 5th day of September, A. D. 1888.

[Seal Supreme Court of the State of Louisiana.]

E. BERMUDEZ,
Chief Justice.

25 *Sale and Transfer from New Orleans City Railroad Co. and New Orleans City and Lake Railroad Co.*

STATE OF LOUISIANA, *Parish of Orleans:*

Be it known that on this ninth day of June, in the year one thousand eight hundred and eighty-three, before me, William Octave Hart, a notary public in and for this parish and State, duly commissioned and sworn, personally came and appeared Messrs. Albert Baldwin, Charles E. Black, and Hypolite Gally, all of this city, and herein appearing and acting as the liquidating commissioners of the New Orleans City Railroad Company, late a corporation of this city and State, organized by act before Edward Barnett, late a notary public in this city, on June 15th, 1860, said commissioners being appointed at a general meeting of the stockholders of said company, held May 15th and 16th, 1883, as will more fully appear by reference to a duly certified copy of the resolution adopted at said meeting, made part hereof and hereto annexed.

And the said appearers severally declared that, by virtue of the power vested in them by said resolution, they do hereby grant, bargain, sell, assign, transfer, convey, abandon, set over, and deliver, with all legal warrantees and with substitution and subrogation to all rights and actions of warranty against former owners and possessors, unto "The New Orleans City and Lake Railroad Company," a legal corporation of this city and State, organized by act before

the undersigned notary, May 17th, 1883, and herein represented by Brownlee W. Taylor, Isaac L. Lyons, and Richard M. O'Brien,
26 the committee named in article nine of its charter, as well as by its president, Joseph A. Walker, and its secretary, William E. Leverich, all here present, accepting and purchasing for said company, its successors and assigns, and acknowledging due delivery and possession thereof, all and singular the property of said late New Orleans City Railroad Company, real and personal, movable and immovable, as hereinafter described.

Real estate.

1st. A certain square of ground, together with all the improvements thereon, rights, ways, privileges, and appurtenances thereto belonging or in anywise appertaining, situated in the second district of this city, and comprised within Canal, Custom-House, Dupre, and White streets, and designated by the number thirty on a plan drawn by L. Surgi, surveyor, dated 31st of December, 1849, and deposited in the office of O. H. Perry, late a notary in this city. Said square measures two hundred and eighty-three feet four inches seven lines on Canal street, a like measurement on Custom-House street, three hundred and thirteen feet four inches on Dupre street, and a like measurement on White street; which said property was purchased by the said New Orleans City Railroad Company by act passed before Theodore O. Stark, late notary in this city, July 20th, 1860, from W. A. Bell.

2nd. Eight lots of ground adjoining each other, situated in the second district of this city, and designated by the numbers five, six, seven, eight, nine, ten, eleven, and twelve, in a portion of ground which is bounded on two sides by the old shell road of Bayou St. John, and on a third side by Esplanade street, four of which lots, the numbers six, seven, ten, and eleven, are fronting on Esplanade street, and the four others, numbers five, eight, nine, and twelve, are fronting on said old shell road, which four first lots adjoin the four others in the rear. And the said eight lots, agreeably to a plan drawn by C. A. de Armas, dated 18th May, 1859, and deposited in the office of Jos. Cuvillier, notary, have the following dimensions, in American measure, to wit: Lot number five measures thirty-two feet one inch and four lines front on the old shell road of Bayou St. John, two hundred and twenty-seven feet ten inches and five lines in
27 depth on the line dividing it from lot number four, two hundred and twenty-eight feet seven inches and one line on the line dividing it from lot number eight, and thirty-two feet five inches and a half line on the rear line.

Lot number eight measures thirty-two feet one inch and four lines front on the old shell road of Bayou St. John, two hundred and twenty-eight feet seven inches and one line on the line dividing it from lot number five, two hundred and twenty-nine feet three inches and five lines on the line dividing it from lot number nine, and thirty-two feet five inches and one-half line on the rear line.

Lot number nine measures thirty-two feet one inch and four lines front on said old shell road, two hundred and twenty-nine feet three

inches and five lines on the line dividing it from lot number eight, two hundred and thirty feet one line on the line dividing it from lot number twelve, and thirty-two feet five inches and one-half line on the rear line.

Lot number twelve measures thirty-two feet one inch and five lines front on the line dividing it from lot number nine, and two hundred and thirty feet eight inches and five lines on the line dividing it from the property lately belonging to the late A. Vignes, and thirty-two feet five inches and one line and a half on the rear line.

Lot number eleven measures thirty-two feet seven inches and two lines front on Esplanade street by two hundred and thirty feet eight inches and six lines in depth on the line dividing it from lot number thirteen, two hundred and thirty feet one line in depth on the line dividing it from lot number ten, and thirty-two feet five inches and one line and a half on the rear line.

Lot number ten measures thirty-two feet seven inches and two lines front on Esplanade street by two hundred and thirty feet one line in depth on the line dividing it from lot number eleven, two hundred and twenty-nine feet three inches and five lines on the line dividing it from lot number seven, and thirty-two feet five inches and one-half line on the rear line.

Lot number seven measures thirty-two feet seven inches and two lines front on Esplanade street by two hundred and twenty-nine feet three inches and five lines on the line dividing it from lot number ten, two hundred and twenty-eight feet seven inches and one line on the line dividing it from lot number six, and thirty-two feet five inches and one-half line on the rear line.

28 And lot number six measures thirty-two feet seven inches and two lines front on Esplanade street by two hundred and twenty-eight feet seven inches and one line in depth on the line dividing it from lot number seven, and two hundred and twenty-seven feet ten inches and five lines in depth on the line dividing it from lot number three, and thirty-two feet five inches and a half line on the rear line.

Which said property was purchased by the said New Orleans City Railroad Company from the Church of St. Louis of New Orleans by an act passed before said notary, Cuvillier, on November 22d, 1860.

3rd. A certain lot or parcel of ground of irregular dimensions, together with all the buildings and improvements thereon, situate in the square bounded by Nayades, or St. Charles, Pleasant, Toledano, and Prytania streets, in the fourth district of this city, and measuring six feet front on said Nayades, or St. Charles street, two hundred and eighty-six feet seven inches front on said Pleasant street, two hundred and eighty-seven feet six inches front on said Toledano street, and twenty-six feet on the rear line.

Which said property was purchased by the said New Orleans City Railroad Company from E. J. Hart by an act passed before William L. Poole, notary, on March 8th, 1861.

4th. "A." Seven lots of ground situated in the square number fourteen, which is bounded by Pleasant, Harmony, Camp, and Mag-

azine streets, designated by the numbers one, two, three, four, five, six, and seven on a plan drawn by C. A. Hedin, surveyor, on the 27th November, 1849, and deposited as plan No. 180 in the office of Theodore Guyol, notary public, in this city. Lots numbers one, two, three, and four adjoin each other and measure each thirty feet front on Magazine street by one hundred and fifteen feet in depth between parallel lines, lot number four forming the corner of Magazine and Pleasant streets and lots numbers five, six, and seven adjoin each other and measure each thirty feet in front on said Pleasant street by one hundred and twenty feet in depth between parallel lines.

"B." A certain lot of ground situated in the said square number fourteen, designated by the letter A on a sketch dated the 29 23rd of June, 1852, and annexed to an act passed before L. R. Kenny, then notary in this city, on the 25th of June, 1852. Said lot measures thirty feet front on Pleasant street, between Magazine and Camp streets, by a depth of one hundred and twenty feet between parallel lines, American measure, and is composed of the rear part of lots numbers eight, nine, ten, and eleven of said square, according to the above-mentioned plan of C. A. Hedin.

"C." Four certain lots of ground situated in the said square number fourteen, designated by the letters "B, C, D, and E" on a sketch paraphed "*ne varietur*," and annexed to an act passed before J. F. Coffey, notary, on the 24th day of March, 1859. Said lots adjoin each other and measure each thirty feet front on Camp street by a depth of eighty-five feet between parallel lines, said lot "B" forming the corner of Camp and Pleasant streets; which said four lots of ground form the greater parts of lots designated by the numbers eight, nine, ten, and eleven on the said above-mentioned plan by C. A. Hedin.

"D." Five certain lots of ground situated in the said fourth district, in the square number thirteen, comprised within Pleasant, Magazine, Camp, and Toledano streets, designated by the numbers seven, eight, nine, ten, and eleven on a plan drawn by C. A. Hedin, dated the 21st day of February, 1849, and deposited in the office of L. R. Kenny, then notary, and measuring as follows, to wit: Lot number seven measures twenty-nine feet one inch and one-eleventh in front on Pleasant street by a depth of one hundred and nineteen feet four inches four and one-fourth lines on the line nearest to Magazine street, and by a depth of one hundred and seventeen feet five inches and one line and five-elevenths on the line of lot number six.

Lots numbers eight, nine, ten, and eleven adjoin each other and measure each thirty-one feet nine inches and four lines front on Magazine street by the following depths, to wit: Lots numbers eight, nine, and ten, each one hundred and sixteen feet four inches and four-elevenths between parallel lines, and lot number eleven, one hundred and sixteen feet four inches and four-elevenths on the line of lot number ten and one hundred and seventeen feet two 30 inches seven and three-fourths lines on the line of Suburb Plaisance, now Toledano street, the whole American measure.

"E." Three lots of ground situated in the said square number thirteen, designated by the numbers four, five, and six on said above-mentioned plan drawn by C. A. Hedin on the 21st February, 1849, adjoining each other and measuring each twenty-nine feet one inch and one-eleventh front on said Pleasant street, twenty-nine feet three inches and five lines and nine-elevenths in width in the rear by the following depths, to wit:

Lot number six, one hundred and fifteen feet five inches six lines and six-elevenths.

Lot number five, one hundred and thirteen feet six inches three lines and seven-elevenths, and lot number four, one hundred and eleven feet seven inches and eight-elevenths.

"F." Three certain lots of ground situated in the said square number thirteen, designated by the numbers one, two, and three on said above-mentioned plan drawn by C. A. Hedin on the 21st February, 1849, and measuring as follows, to wit: Lot number one, forming the corner of Camp and Pleasant streets, measures twenty-nine feet one inch and one-eleventh in front on Pleasant street, one hundred and five feet nine inches deep and front on Camp street, one hundred and eight feet seven inches and ten-elevenths in depth on the line of lot number two, and twenty-nine feet three inches and five lines and nine-tenths in width in the rear.

Lot number two measures twenty-nine feet one inch and one-eleventh front on Pleasant street, one hundred and seven feet eight inches and ten-elevenths deep on the line of lot number one, one hundred and nine feet seven inches and nine-elevenths deep on the line of lot number three, and twenty-nine feet three inches and five lines and nine-elevenths in width in the rear, and lot number three measures twenty-nine feet one inch and one-eleventh front on Pleasant street, one hundred and nine feet seven inches and nine-elevenths in depth on the line of lot number two, one hundred and eleven feet seven inches and eight lines on the line of lot
31 number four, and twenty-nine feet three inches and five and nine-elevenths lines in width in the rear, American measure, together with all the buildings and improvements thereon, rights, ways, servitudes, privileges, and advantages thereunto belonging or in anywise appertaining.

Which said property was purchased by the said New Orleans City Railroad Company from Henry Hart and Frederick Wintz, by an act passed before Edward Barnett, late notary in this city, on the 20th March, 1861.

5th. A certain lot of ground situated in the fourth district of this city, designated by lot number one, of square bounded by Toledano, Pleasant, Nayades, now St. Charles, and Prytania streets, and measuring thirty-two feet eight inches, more or less, in front on Prytania street by one hundred and fifty feet deep and front on Pleasant street, and about twenty-six feet on the rear line, dividing it from lot number two, as per plan drawn by Adl. Knell, architect and civil engineer, dated the 11th October, 1851, and deposited in the office of Ant. Doriocourt, notary in this city, a sketch of which said plan is thereunto annexed for reference to the act of purchase.

Which said property was purchased by the said New Orleans City Railroad Company from Joseph Llado, by an act passed before Edward Barnett, late notary in this city, on March 20th, 1861.

6th. A certain square of ground, situate, lying, and being in the third district of this city, bounded by Goodchildren, Love, Poland, and Lesseps streets, and having, English measure, two hundred and seventy-seven feet eight inches in front on Goodchildren street, the same front on Love street, three hundred and ninety-six feet three inches in front on Lesseps street, and the same front on Poland street, as per plan of Faubourg Washington, drawn by Joseph Pilié, city surveyor, under date of the 25th of February, 1832, deposited in the office of Charles Janin, late notary public in this city, on the fifth of March following, together with all the rights, privileges, and advantages thereunto belonging or in anywise appertaining.

Which said property was purchased by the said New Orleans City Railroad Company from Charles A. Barriere and Wm.
32 S. Toole, by an act passed before Edward Barnett, late notary in this city, on March 30th, 1861.

7th. Four lots of ground adjoining each other, situate in the second district of this city, designated by the numbers one, two, three, and four, in a portion of ground bounded on both sides by the Bayou St. John and on a third side by Esplanade street; which lots of ground measure, in American measure, as follows, to wit: Lot number one, thirty-two feet one inch five lines front on the old shell road by two hundred and twenty-six feet five inches five lines in depth on the line dividing it from Mr. Musgrove's property; lot number four, thirty-two feet one inch four lines front on the old shell road by a depth of two hundred and twenty-seven feet two inches one line on the line dividing it from lot number one, and two hundred and twenty-seven feet ten inches five lines in depth on the line dividing it from lot number five; lots numbers two and three measure each thirty-two feet seven inches two lines front on Esplanade street by a depth as follows: Lot number two, of two hundred and twenty-six feet five inches and six lines on the line dividing it from Mr. Musgrove's property; lot number three, two hundred and twenty-seven feet two inches and one line on the line dividing it from lot number two, and two hundred and twenty-seven feet ten inches and five lines on the line dividing it from lot number six. Said lots numbers one, two, three, and four are contiguous to each other on their rear lines.

Agreeably to a plan drawn by Chas. A. de Armas, dated 18th May, 1859, and deposited in the office of J. Cuvillier, notary, for reference, together with all the buildings and improvements thereon and all the rights, ways, servitudes, privileges, and advantages thereunto belonging or in anywise appertaining.

Which said property was purchased by the said New Orleans City Railroad Company from Henry Willett by an act passed before Edward Barnett, late notary in this city, on 22d September, 1854.

8th. A certain square of ground, with the improvements thereon, situate in the second district of this city, and designated by the

number thirty-one, on a plan drawn by L. Surgi, surveyor, on the 31st December, 1849, and deposited in the office of O. H. Perry, late a notary public in this city.

33 Which said square is bounded by Dupré, White, Custom-House, and Bienville streets, and is subdivided into twenty-two lots.

Which said property was purchased by the said New Orleans City Railroad Company from German Society of New Orleans, by an act passed before Theo. Guyol, notary, on June 13th, 1877.

9th. That portion of ground situate on the shore of Lake Pontchartrain, on the left side of the new canal going to said lake, and in front of lots numbers ten, eleven, twelve, thirteen, fourteen, and fifteen, on a plan drawn by W. H. Williams, surveyor and engineer, on the twentieth day of April, eighteen hundred and seventy-one, and deposited in the office of Theo. Guyol, notary in this city, as plan I, the said portion of ground commencing from the line of division between lots numbered eight and nine of said plan—that is to say, at a distance of one hundred feet from the corner of Mercer street, thence extending along Lake avenue about nine hundred and ten feet to the division line between the property of the New Orleans Canal and Banking Company and that of Hazeur Brothers, by a depth running to the lake; together with all the rights of accretion in front of said portion of ground and all the rights, claims, and privileges to which the said New Orleans Canal and Banking Company was entitled as front proprietors.

Which said property was purchased by the said New Orleans City Railroad Company by act before Theo. Guyol, March 9th, 1881, from said banking company.

Right of way and franchises.

1st. The right of way and franchise for the privilege of running street cars on what are known as the "Camp and Prytania Line," the "Magazine Line," the "Rampart and Dauphine Line," the "Canal Street and Metairie Road Line," the "Metairie Ridge and Bayou St. John Line," and the "Esplanade and Bayou Bridge Line," purchased from the city of New Orleans October 2d, 1879, by act before G. Legardeur, Jr., notary public in this city, passed in accordance with Ordinances Nos. 4968, 5020, and 6148, A. S., and omission supplied by Ordinance 7127, A. S., adopted May 31st, 1881.

2d. The right of way and franchise for the privilege of running street cars on what is known as the extension of the

34 "Camp and Prytania Line," as per contract with the city of New Orleans, passed before Joseph D. Taylor, notary public in this city, on February 27th, 1883, passed in accordance with Ordinance No. 54, Council Series.

3d. The right of way and franchise for the privilege of running street cars on what is known as the extension of the "Magazine Line," as per contract with the city of New Orleans, passed before Joseph D. Taylor, notary public in this city, on May 15th, 1883, passed in accordance with Ordinances Nos. 248 and 276, Council Series.

4th. The right of way and franchise for the privilege of running street cars on what is known as the "Levee and Barracks Line," purchased from the city of New Orleans, June 9th, 1862, by act before C. E. Fortier, late notary in this city, passed in accordance with Ordinances Nos. 6033 and 6053, Old Series, amended by Ordinances Nos. 6322 and 6405, Old Series, and 490 and 1506, New Series. (NOTE.—Under these ordinances this right of way exists until June 8th, 1897.)

5th. The right of way and franchise for the privilege of running street cars on what is known as the "Slaughter-house Extension," from Delery street over the levee road or street to the Crescent City Live Stock Landing and Slaughter-house Company's premises, granted by Ordinance No. 1682, A. S., adopted July 30th, 1872.

6th. The right of the exclusive use of the lake front of the revetment levee situated between the end of the New Canal and the bridge of the Upper Line Canal, for the period of twenty-five years from January 27th, 1880, as per Ordinance No. 6316, A. S., adopted that day.

7th. The right of use and occupancy of the buildings and other improvements erected on said lake front and which revert to the city of New Orleans at the expiration of said twenty-five years, consisting of wharf, hotel, bar-room, pavilion, music stand, machine shop, depot, etc.

8th. The right and privilege of running trains propelled by steam-power from the lake to the stand now established on Canal and Carondelet streets, derived from ordinances of the city of New Orleans No. 3565, adopted June 13th, 1876, and No. 3617, adopted August 22nd, 1876; No. 6528, adopted June 15th, 1880, and No. 6891, adopted March 3rd, 1881.

35 [NOTE.—These last three ordinances are to be construed together, and as the right to run said steam-trains on Canal street, between Basin and Carondelet streets, is now in contest, the transfer of this right is made without warranty. See F. W. Tilton *et als. vs.* New Orleans City Railroad Company, No. 8613, supreme court of Louisiana.]

Also from contract with the city, passed before G. Le Gardeur, notary, on July 1st, 1878, and from act of consolidation with the New Orleans, Metairie and Lake Railroad Company, of date December 21st, 1875, and January 12th, 1876, deposited with the secretary of state January 24th, 1876, said New Orleans, Metairie and Lake Railroad Company being incorporated by act of the Legislature No. 133, approved April 20th, 1869.

Rolling stock, live stock, etc.

1st. Six hundred and forty-five mules.
2nd. Twenty-seven ponies.
3rd. One hundred and forty-eight cars.
4th. Nine engines.
5th. Forty coaches.

6th. Seven floats, twelve carts, one dray, two baggage cars, three wagons, and two flat cars.

7th. Feed and harness.

8th. Contents of blacksmith, harness, and machine shops at Magazine, Canal, Bayou Road, and Poland stations.

9th. Machinery for electric light at West End.

10th. Furniture at West End Hotel, and office furniture, iron safes, stationery, etc., at 102 Canal street, second floor.

Road-bed.

Tracks aggregating about fifty-miles, including cross-ties, stringers, tie-rods, rails, etc., running on the following streets:

1st. "Magazine Line:" Double track on Canal street from Exchange Place to Camp street, and on Magazine street, from Toledano street to St. Andrew street; single track on Camp and Magazine streets, from Canal street to St. Andrew street, and on Canal street, from Magazine street to Camp street.

2nd. "Prytania Line:" Double track on Prytania street, from its junction with Camp street to Upper Line street; on Upper
36 Line street, from Prytania street to Pitt street; on Pitt street, from Soniat street to Upper Line street; on Dufossat street, from St. Charles street to Boudousquie street; single track on Pitt and Boudousquie, from Soniat to Dufossat, and on Soniat and Dufossat, from Boudousquie to Pitt street.

3rd. "Rampart and Dauphine Line:" Double track on Rampart street, from Canal street to Esplanade street; on Poland street, from Dauphine street to Rampart street; on Dauphine street, from Poland street to Delery street; on Levee, from Delery street to Slaughter-house; and single track on Dauphine street, from Esplanade street to Poland street, and on Rampart street between same streets.

4th. "Canal Street and Metairie Road Line:" Double track on Canal street, from St. Charles street to Metairie road.

5th. "Metairie Road and Bayou St. John Line:" Double track on Metairie Ridge, from new canal to Carondelet canal or Bayou St. John.

6th. "Esplanade and Bayou Bridge Line:" Double track on Esplanade street, from Rampart street to Bayou St. John.

7th. "Esplanade and French Market Line:" Double track on Esplanade street, from Levee street to Victory street, and from Bourbon street to Rampart street.

8th. "Levee and Barracks Line:" Double track on Canal street, from Decatur street to North Peters street; on North Peters street, from Canal street to Enghein street; Enghein street, from North Peters to Chartres street; Poland street from Dauphine street to Royal street; single track on Chartres street, from Enghein street to Poland street; on Poland and Enghein streets, from Royal to Chartres street; Royal street, from Poland street to Enghein street.

9th. "West End Line:" Double track along the New Canal, from end of Canal street line to Lake.

10th. And all the switches, turn-outs, turn-tables, connections, extra tracks, etc., used or belonging to any of the above lines.

This sale and transfer is made and accepted for and in consideration of the price and sum of one million four hundred thousand dollars, represented by fourteen thousand shares of the capital stock of the New Orleans City and Lake Railroad Company of the par value of one hundred dollars each, which have been delivered to the liqui-
37 dating commissioners of the New Orleans City Railroad Company, who, in the name of the stockholders thereof, grant full acquittance and discharge therefor to the present purchaser.

And in accordance with articles IV and V of its charter and as a further consideration of the sale herein made the said New Orleans City and Lake Railroad Company hereby assumes all the obligations and contracts of the said New Orleans City Railroad Company, whether the same relate to individuals, other private corporations, the city of New Orleans, or the State of Louisiana, and it binds itself, its successors and assigns, to fully discharge and execute same.

And it further obligates itself to pay and liquidate all the bonded, judgment, and floating debt of said New Orleans City Railroad Company, as hereinafter set forth.

1st. "Bounded debt," amounting to seven hundred thousand dollars, fully set forth and described in an act of mortgage, dated December 1st, 1879, granted by said company to Joseph A. Walker, before N. B. Trist, notary public in this city, and recorded in the mortgage office of this parish, in Book 176, folio 611; and said purchaser hereby binds itself, its successors and assigns, not to alienate nor encumber the property herein conveyed to the prejudice of said mortgage, which, as well as the contract amendatory thereof, passed before same notary on March 11th, 1880, is hereby expressly assumed; and in this connection said commissioners hereby transfer to said purchaser the deposit in the Canal Bank of this city to the credit of said bonded debt, made in accordance with said contract, now amounting to the sum of twenty thousand two hundred and seventy-four dollars and eighty cents; and they also transfer all other cash of said New Orleans City Railroad Company, whether in bank or on hand, the receipt of which is hereby acknowledged by the representatives of the purchaser, and a statement of the amount thereof dispensed with.

2nd. "Judgment debt."—"A." City of New Orleans *vs.* New Orleans City Railroad Company, No. 1247, division "C" of the civil district court for the parish of Orleans. Judgment for $11,239.20, with ten per cent. per annum interest from March 31st, 1881, and costs, being for city taxes for 1881 on the franchises of the company, assessed at $630,000.

38 "B." William Mattle *vs.* New Orleans City Railroad Company *et al.*, No. 4596 of same court. Judgment for $1,000, with legal interest from December 1st, 1881, and costs, being for damages claimed for expulsion from car. Now pending on appeal in supreme court of Louisiana.

"C." Caroline M. Schiller *vs.* New Orleans City Railroad Company, No. 5877 of same court. Judgment for $2,691.16, with legal

interest from April 27th, 1882, and costs, being for value of stock unlawfully transferred. Has been appealed, and propositions of compromise now pending.

"D." Ophelia E. Schiller, wife of W. H. Rolling, *vs.* New Orleans City Railroad Company, No. 5874 of same court. Judgment for $1,269.33⅓, with nine per cent. back dividends and costs; similar to claim above. Propositions of compromise pending; possibility of appeal by plaintiff.

"E." Mary E. Schiller, wife of O. A. Fairex, *vs.* New Orleans City Railroad Company, No. 8144 of same court; same judgment as above and in same condition.

3rd. "Floating debt."—"A." Claim of City of New Orleans for taxes of 1882 on the franchises of the company, assessed at $630,000, amounting to twenty thousand and three dollars, with ten per cent. per annum interest from March 31st, 1882, till paid, and costs, as per suit No. 3548, division "B" of the civil district court for the parish of Orleans.

"B." Claim of Charles E. B. de La Brettonne and wife for twenty-five thousand dollars, resulting from injury to and death of minor child, as per suit No. 6842, division "B," civil district court for the parish of Orleans.

"C." Claim of Mrs. Mary Parish for ten thousand dollars, resulting from alleged injuries caused by premature starting of car, as per suit No. 8091, division "D," civil district court for the parish of Orleans.

"D." Claim of Crescent City Railroad Company for twenty-five thousand dollars damages, alleged to have been caused by the illegal issuance of an injunction, as per suit No. 8421, division "E," civil district court for the parish of Orleans.

(NOTE.—The above suits are now pending and undetermined, and in all of them the New Orleans Railroad Company, through its attorneys, filed proper defenses, and no liability is admitted to
39 exist as to any of them, either by the present vendor or the present purchaser, it being the true meaning and intent of this assumption that the New Orleans City and Lake Railroad Company binds itself in no other manner than to satisfy whatever final judgments may be rendered in said suits against it by reason of its hereby becoming defendant therein.)

"E." And whatever "floating debt proper" said New Orleans City Railroad Company may have the present purchaser assumes and dispenses with a detailed statement thereof.

The said purchaser moreover binds itself to carry out all valid existing contracts for the employment or hire of all clerks and other agents, including the musicians engaged for the season at "West End," among whom is embraced Liberati, the cornetist.

The present purchaser is hereby subrogated to all the rights of said New Orleans City Railroad Company existing under any and all contracts heretofore made not herein specially mentioned (should any such be omitted therefrom), and particularly as to the following two:

1st. Contract and agreement with the St. Charles Street Railroad Company for the use of its tracks and road-bed on Esplanade street, between Bourbon and Victory streets, in this city, as per act before W. J. Castell, notary in this city, May 23rd, 1874.

2nd. Contract and agreement with the Firemen's Charitable Association for a twenty-five years' lease, from January 1st, 1876, of that portion of Greenwood Cemetery through which the West End trains now run, and fully described in the act of lease of same, passed before Wm. B. Kleinpeter, late notary in this city, February 8th, 1876.

All the obligations of the above acts are assumed by the present purchaser.

By reference to the annexed certificate of the register of conveyances in and for this parish and city, dated this day, it will appear that the real estate herein sold has not been previously alienated.

40 And by reference to the annexed certificate of the recorder of mortgages in and for this parish and city, dated May 28th, 1883, said real estate appears free of all encumbrances, except inscriptions of the drainage privilege and the aforesaid mortgage of $700,000.

The purchaser assumes payment of any drainage tax that may be legally due and unpaid.

Proper tax receipts have been produced unto me, notary, showing the payment of all taxes due the State of Louisiana and the city of New Orleans, except those claimed by the latter for 1881 and 1882 on the assessed value of the franchises of the New Orleans City Railroad Company, which, subject to the qualifications above set forth, are assumed by the present purchaser, as are also all taxes exigible the current year and based upon the assessments made against the property herein sold as belonging to the New Orleans City Railroad Company.

And said New Orleans City Railroad Company, having, according to law, paid its State and city licenses for 1883, amounting to twenty-five hundred dollars each, hereby transfers the unexpired term thereof, extending to December 31st, 1883, to the present purchaser, the New Orleans City and Lake Railroad Company.

Thus done and passed in the presence of Joseph A. Dare and William S. Ingram, competent witnesses, both of this city, who hereto sign with said parties and me, the notary.

(Original signed.)

ALBERT BALDWIN.
H. GALLY.
CHAS. E. BLACK.
I. L. LYONS.
B. W. TAYLOR.
R. M. O'BRIEN.
J. A. WALKER.
W. E. LEVERICH.
JOS. A. DARE.
W. S. INGRAM.
W. O. HART,
Notary Public.

I hereby certify the above and foregoing to be a true and correct copy of the original act, on file and of record in my office.

W. O. HART,
Notary Public.

41 *Sale of the Right of Way and Franchises by the City of New Orleans to the New Orleans City Railroad Company.*

UNITED STATES OF AMERICA.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Be it known that on this second day of the month of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the 104th, before me, Gustave Le Gardeur, Jr., a notary public, duly commissioned and sworn, in and for the parish and city aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared the Honorable Isaac W. Patton, mayor of the city of New Orleans, herein duly authorized in the full execution of these presents, under and by virtue of Resolution 6148, Administration Series, adopted by the council of the city of New Orleans, on this 2d day of October, 1879, a certified copy whereof is hereto annexed for reference.

And also came and appeared Frederick Wintz, of this city, president of the New Orleans City Railroad Company, and duly authorized as such in the full execution of these presents under and by virtue of the resolution adopted by the board of directors of the said company at their sitting of the 1st and 22d days of September, 1879, a certified copy whereof is hereto annexed for reference.

42 And the said Mayor Patton, in his said capacity, declared that on the 25th day of March, 1879, the council of the city of New Orleans adopted the following resolution, to wit:

No. 4968, Administration Series.

"Whereas the franchises granted by the city of New Orleans to the New Orleans City Railroad Company for running certain lines of railroad will expire in 1880; and

"Whereas it is necessary to give ample time to all parties who may desire to make bids or proposals for said franchises at the expiration of the time for which said franchises were granted by the city: Therefore be it

"Resolved, That the administrator of commerce be, and is hereby, authorize to advertise until the first day of July, 1879, in the official journal of the city, and also in one journal in the cities of New York, Philadelphia, Boston, Chicago, and St. Louis, for sealed proposals for the franchises of the following-mentioned roads for a period of twenty-five years from the respective dates of the expiration of said franchises granted by the city of New Orleans to the New Orleans City Railroad Company, to wit: 1, the Magazine, Camp, Prytania, Rampart, and Dauphine lines, which expire on the 3d day of Feb-

ruary, 1880; 2, the Canal Street and Metairie Road Line, which expires on the 2d day of July, 1880; 3d, the Esplanade Street Line, which expires on the 2d day of July, 1880.

"That the terms of said sale shall be set forth in specifications, to be drawn up by the administrator of commerce, with the approval of the council, and to be put on file in the office of the administrator of commerce as soon as practicable."

That on the 22d day of April, 1879, the council of the city of New Orleans adopted the following resolution, to wit:

No. 5020, Administration Series.

"Resolved, That ordinance No. 4969, Administration Series, be amended to read as follows:

"That the administrator of commerce be, and is hereby, authorized to advertise until the first day of September, 1879, in the official journal of this city, and also in one journal in the cities of
43 New York, Philadelphia, Boston, Chicago, and St. Louis, for sealed proposals for the sale of the franchises of the railroad lines named therein from the respective dates of the expiration of said franchises granted by the city of New Orleans up to the first day of January, 1906."

That in accordance with the provisions of said resolution No. 4968, administration series, the Honorable J. Henry Behan, administrator of commerce of the city of New Orleans, has published or caused to be published the following advertisement, to wit:

Sale of the franchises of the New Orleans City Railroad Company.

DEPARTMENT OF COMMERCE, ROOM NO. 13, CITY HALL,
NEW ORLEANS, *May 19th*, 1879.

"Sealed proposals will be received at the office of the administrator of commerce, room No. 13, city hall, New Orleans, until 12 m. on the first day of September, 1879, for the right of way on the following railroads, to wit:

"SECTION 1. Camp and Prytania and Camp and Magazine Street Lines, which expire on the third day of February, 1880.

"SECTION 2. Rampart and Dauphine, Canal Street and Metairie Ridge to Bayou St. John, and Esplanade and Bayou Bridge Lines, which expire on the second day of July, 1880.

"The right of way to the purchasers of said franchises shall expire on the first day of January, 1906, and at the expiration of said time the said railroad cars, fixtures, and their appurtenances shall revert to the city on a valuation to be ascertained by two disinterested persons, one to be appointed by the purchaser or purchasers and the other by the city, and, in the event of a disagreement as to said valuation between said persons thus appointed, a third party or umpire shall be appointed by one of the district courts on the joint application of the parties; the decision thereby had to be final.

"That the city shall bind herself to transfer to the purchasers of each line of road, as per sections 1 and 2, the right of reversion, which the city now has, to purchase all the property of each line at an appraised value.

44 "That said franchises shall be sold for cash, the entire price to be paid by the purchaser or purchasers of the franchise or franchises at the time of the delivery of the said franchise or franchises.

"The delivery is made by the signing and delivery of the act of transfer and by placing the purchaser in actual possession.

"That the purchasers of said franchises shall keep in repair the streets and bridges through which the lines of road pass from curb to curb, under the directions of the administrator of improvements and the city surveyor.

"That the fares to be charged by said purchasers on their roads shall never exceed the amounts now charged, except as provided in the specifications herein referred to.

"Each bid shall be accompanied by a deposit or certified check of $50,000 as an evidence of their intention to abide by the adjudication, which amount shall be forfeited in case of failure to sign the contract; and the same shall be held as a special deposit until the final delivery of said road and appurtenances.

"Bidders to whom the contract is not awarded shall have their deposits returned to them on the day adjudication is made. Bidders can bid for either franchise, say, for sections one and two, or both, at their option.

"Pamphlets containing specifications of contract can be obtained on application to the administrator of commerce.

"Proposals must be endorsed 'Bids for the franchises of the New Orleans City Railroad.'

"The city reserves the right to reject any and all bids, and the sale and adjudication shall not be considered as perfected and binding upon the city of New Orleans until the purchaser or purchasers shall have delivered, paid, and deposited the full amount of the price of the bid with whomsoever may be designated by the mayor to receive the same for and on behalf of the city; and until such deposit and payment of the price shall have been made and accepted by the council the adjudication shall not bind the city nor operate as an engagement or contract.

"(Signed) J. HENRY BEHAN,
"*Administrator of Commerce.*"

45 That in accordance with the foregoing advertisement sealed proposals for the franchises of the New Orleans City railroad were received up to 12 m. on Monday, the first day of September, 1879, at the office of the said administrator of commerce.

That on the same day, to wit, on the first day of September, 1879, the mayor and administrator met in committee of the whole in the mayor's parlor; that there and then the said sealed proposals were opened and the proposal of the said New Orleans City Railroad Company for the sum of six hundred and thirty thousand dollars ($630,000) was found to be the highest.

That at the session of the city council on this Thursday, the second day of October, 1879, the bid or the proposal of the said New Orleans City Railroad Company for six hundred and thirty thousand dollars for the franchises of the New Orleans City railroad was accepted by the city council and the mayor instructed to enter into and sign the necessary contract with the said New Orleans City Railroad Company, as fully appears by the said resolution No. 6148, administration series, adopted by the council of the city of New Orleans on this second day of October, 1879, a certified copy whereof is hereto annexed for reference as aforesaid.

Now, therefore, the said mayor, Isaac W. Patton, declared that in consideration of the foregoing, and by virtue of the power in him vested by the said resolution No. 6148, administration series, he does, by these presents, in his said capacity, and for and on behalf of the city of New Orleans, grant, bargain, sell, convey, transfer, assign, and set over unto the said New Orleans City Railroad Company, the said Frederick Wintz, as president aforesaid, accepting and purchasing for and in the name of the said New Orleans City Railroad Company, and acknowledging due delivery and possession of all the property, cars, fixtures, and other appurtenances thereunto belonging or in anywise appertaining—

The right of way and franchises of the following railroads, to wit:

SECTION 1. Camp and Prytania and Camp and Magazine
46 Streets lines for the full term and period, commencing on and to be computed from the third day of February, 1880, and to end on the first day of January, 1906.

SEC. 2. Rampart and Dauphine, Canal Street and Metairie Ridge, to Bayou St. John, and Esplanade and Bayou Bridge lines, for the full term and period, commencing on and to be computed from the second day of July, 1880, and to end on the first day of January, 1906.

To have and to hold the said right of way and franchises of the said railroad lines, and the right of reversion of the city to purchase all the property of each line, unto the said New Orleans City Railroad Company, its successors and assigns, transferees and vendees, for the full term and period hereinabove fixed and determined by these presents.

This sale is made and accepted in accordance with the specifications on file in the office of the administrator of commerce; which said specifications are in the words and figures following, to wit:

Specifications concerning the sale of the right of way and franchises for a term of years, expiring on the first day of January, 1906, as per ordinances Nos. 4968 and 5030, administration series, hereunto annexed, of the following street railroads of the New Orleans City Railroad Company, to wit:

"Camp and Prytania, Camp and Magazine, Rampart and Dauphine, Canal Street and Metairie Road to Bayou St. John, and Esplanade and Bayou Bridge lines."

"SECTION FIRST.

"Camp and Prytania Streets line, Camp and Magazine Streets line.

"SECTION SECOND.

"Rampart and Dauphine, Canal street and Metairie road to Bayou St. John, Esplanade and Bayou Bridge. The Camp and Prytania, Camp and Magazine, and Rampart and Dauphine Streets lines expire on the third day of February, 1880. (See ordinance No. 4945, attached.)

"The Canal Street and Metairie Road and the Esplanade and Bayou Bridge lines expire on the second day of July, 1880. (See ordinance No. 5244, attached.)

"The above-mentioned roads run on the following streets:

47 "FIRST SECTION.

"Comprises the following roads passing through the streets hereinafter named, with tracks, turn-outs, and turn-tables, viz:

"*The Camp and Prytania and Camp and Magazine Lines.*

"Three tracks on Canal street, from St. Charles to Camp street; single track on Canal street, from Magazine to Camp street; single track on Magazine, from Canal street to St. Andrew street; double track on Magazine, from St. Andrew to Toledano street; double track on Prytania, from Poeyfarre to Toledano street; single track on Camp street, from Poeyfarre to Canal street; single track on Poeyfarre street, from Magazine to Camp street; single track on Toledano street, from Camp to Prytania street.

"SECOND SECTION.

"Comprises the following roads passing through the streets hereinafter named, with the tracks, turn-outs, and turn-tables:

"*Rampart and Dauphine Streets Lines.*

"Double track on Rampart street, from Canal street to Esplanade street; a single track on Dauphine street, from Esplanade to Poland street; a single track on Rampart street, from Esplanade to Poland street; a double track on Poland street, from Dauphine to Rampart street; a double track on Dauphine street, from Poland street to Caffin's Lane; a single track on Dauphine street, from Caffin's Lane to Delery street, with the right of a double track.

"*Canal Street and Metairie Road to Bayou St. John.*

"A double track on Canal street, from Carondelet street to Metairie Road, along Metairie Road to New Canal; four tracks on Canal street, from St. Charles to Carondelet street; double track on Metairie Ridge, from New Canal to Carondelet Canal or Bayou St. John.

"*Esplanade and Bayou Bridge Lines.*

"Double track on Esplanade street, from Rampart street to Bayou St. John; double track on Esplanade street, from Levee to
48 Rampart street (see ordinance No. 2518, attached). All these rights revert to the city at the expiration of the twenty years, to wit, the third day of February and the second day of July, 1880."

"'Ordinace No. 4945, Old Series.

"'Resolved, That the adjudication made by the controller on the twentieth day of January, 1860, of the right of way to establish railroads in the city of New Orleans, under and by virtue of resolutions Nos. 4364, 4474, 4735, and 4766, to J. B. Slawson, securities Henry Hart, F. Wintz, and P. Irwin, for and in consideration of $130,000 bonus offered by him, be, and the same is hereby, approved, the securities accepted, and the mayor authorized to sign the necessary act or acts with the said parties.'

"'Ordinance No. 5244, Old Series.

"'Resolved, That the following adjudications made by the controller on the second of June, 1860, be, and the same are hereby, approved, and the securities accepted, viz:

"'First. Under resolution No. 5122, the right of way for a railroad on Canal street, from Rampart street to the Metairie Ridge, to J. B. Slawson & Co.; security, Henry Hart, P. Irwin, and Frederick Wintz, for $500 bonus.

"'Second. Under resolution No. 5119, the right of way for railroad on Esplanade street, from Rampart street to Bayou St. John, to J. B. Slawson & Co.; security, Henry Hart, Patrick Irwin, and Frederick Wintz, for $500 bonus.

"'Resolved further, That the mayor be, and he is hereby, authorized to sign the necessary act or acts with the said parties for the performance of the work.'

"'Ordinance No. 2518, Administration Series.

"'An ordinance granting to the City Railroad Company the right of way for a railroad on Esplanade street, to connect the Esplanade and Bayou Line of the New Orleans City Railroad Company with the Levee Line, and other purposes.'

"'Be it ordained by the city council, That for and in consideration of the sum of one thousand dollars in United States currency, to be immediately paid into the city treasury, there be, and is hereby, granted to the New Orleans City
49 Railroad Company the right of way and privilege of constructing and laying a double-track railroad on Esplanade street, to extend from the junction of Rampart to Peters or Levee street, for the purpose of connecting the Esplanade and Bayou line with the Levee line of said company, the tracks, cars, equipments, management, and regulations to conform to and be identical with the roads to be connected. Said grant of right of way shall continue

during the continuance of the charter of the New Orleans City Railroad Company and shall terminate therewith. The track shall be laid in accordance with the specifications to be furnished by the city surveyor.

"'The purchaser or purchasers shall be bound to keep the paved or unpaved streets through which said track pass, as well as all the bridges on said streets, in good repair and condition from curb to curb during the continuance of their privilege and right of way.

"'They shall, on proper notification from the administrator of improvements and the city surveyor, raise, repair, and repave any or all intersections of streets when required upon lines and levels to be furnished by the city surveyor.

"'They shall be required to widen and deepen any or all culverts and sluices to such dimensions as may be required and directed by the city surveyor. They shall be required to keep all bridges in repair and make new ones when required by the administrator of improvements and the city surveyor on all the streets through which their lines pass.

"'The lines of said tracks within the rails shall be paved with round stone, except where square stone pavements exist or may hereafter be made, in which case the same material shall be used for paving within rails. When the paving of the streets, where the same are paved, as well as the shelling of the streets where the same are shelled, shall be taken up for the purpose of repair, they shall be replaced in the same condition as formerly, and the streets graded to a proper grade to be furnished by the city surveyor. Wherever the streets are not yet paved the lines of the tracks, within the rails, shall be paved with either round stones or with four by five inch scantling in the best workmanlike manner, and the space between the lines of track and the gutters of the streets shall be
50 flanked with yellow pine planks three inches thick, laid on stringers of four inches thick by eight inches wide; the timber used to be of the best quality and to the entire satisfaction of the administrator of improvements and city surveyor. The rails shall be of the same pattern as those now in use. The cross-ties shall be of yellow pine, six by eight inches and eight feet long; the string pieces of yellow pine, five by eight inches, all of the best quality of lumber and to the entire satisfaction of the administrator of improvements and city surveyor.'

"Should the purchaser or purchasers at any time refuse to comply with any or all the requirements of these specifications, or fail to comply with the notifications of the administrator of improvements and the city surveyor, or refuse or neglect to keep the streets and bridges in good order and condition, he or they or their authorized representatives shall be subject to a fine of $25 or thirty days' imprisonment for each and every offense at the discretion of the court, said fine to be recoverable before the recorder of the municipal district in which the offense was committed.

"The fare on the Camp and Magazine line, between Canal and Toledano streets, or for any lesser distance between those points, shall not exceed five cents for passenger either way, except as is hereinafter provided.

"The fare on the Camp and Prytania line, between Canal and Toledano streets, shall not exceed five cents per passenger either way, except as hereinafter provided.

"The fare on the Rampart and Dauphine line, between Canal street and the United States barracks, shall not exceed five cents per passenger either way, except as hereinafter provided.

"The fare on the Canal Street and Metairie Road line, from neutral ground on Canal street between Carondelet and St. Charles to Metairie Ridge or cemeteries, shall not exceed five cents per passenger either way, except as is hereinafter provided.

"The fare on the Esplanade and Bayou Bridge line, from Canal street to Bayou bridge, shall not exceed five cents per passenger either way, except as hereinafter provided.

51 "They shall further be allowed to charge five cents from the New Canal to Bayou St. John, on the Ridge line.

"The style of cars used to be the same as those now in use, unless some improved and advantageous pattern is introduced during the existence of this contract, when, upon application to and approval by the council, the same may be changed.

"The cars shall be drawn by horse or mule power, and if more than one horse or mule be used for each car they shall be driven abreast.

"Said cars shall be run as often during the day or night as the purchasers may deem proper, but not at greater intervals than every ten minutes, from daylight to 10 o'clock p. m., and every fifteen minutes from 10 o'clock until 12.30 o'clock a. m., and every hour thereafter until daylight on the Camp and Magazine, the Camp and Prytania, the Rampart and Dauphine to Poland street, the Esplanade and Bayou Bridge, and the Canal and Ridge line to Broad-street station. For each and every fare after 12.30 o'clock they shall be allowed to charge twenty-five cents.

"Said purchaser or purchasers shall annually pay into the city treasury, upon the assessed value of said road and fixtures, the annual tax levied upon real estate, the value of said road and fixtures to be assessed by the usual mode of assessment. The speed of said cars shall not exceed six miles per hour. All cars that may be run on said railroads between sunset and daybreak shall be provided with a good and ample head-light placed in a conspicuous position in and on said cars, and for the violation of this or any other ordinance now existing or that may hereafter be enacted in accordance with the provisions of these specifications on the part of any officer or employee of said roads the purchaser or purchasers shall be liable to all fines and damages arising therefrom.

"The city binds herself to transfer to the purchaser or purchasers of the franchises of the New Orleans City railroad, as herein set forth, the right of reversion which the city now has to purchase all the property, cars, fixtures, and other appurtenances of each line at an appraised value, in accordance with the following section of their present contract, to wit:

52 "'The said railroads, cars, fixtures, and other appurtenances shall revert to the city at the expiration of the said twenty

years' privilege on a valuation to be ascertained by two disinterested persons, one to be appointed by the purchaser or purchasers and the other by the city; and in the event of a disagreement as to said valuation between said persons a third party or umpire shall be appointed by one of the district courts, the decision thereby had to be final.'

"The rights of way are for street railroads carrying passengers only.

"It is understood that the purchaser or purchasers are allowed to make such turn-outs and crossings as may be necessary on the streets through which they have the right of way on lines and levels to be furnished by the city surveyor.

"The city of New Orleans binds herself not to grant during the period for which said franchises are sold a right of way to any other railroad company upon the streets through which said right of way is hereby sold, unless by mutual agreement between the city and the purchaser or purchasers of these franchises.

"The purchaser or purchasers are not to change any of the tracks from the lines and levels now existing without the consent of the city council.

"The city reserves the right to limit the running of steam-trains on Canal street to any part where the council may deem it expedient and necessary in the interests of the property-holders or the community at large.

"The city reserves the right to reject any and all bids, and the sale and adjudication shall not be considered as perfected and binding upon the city of New Orleans until the purchaser or purchasers shall have delivered, paid, and deposited the full amount of the price of the bid with whomsoever may be designated by the mayor to receive the same for and on behalf of the city, and until such deposit and payment of the price shall have been made and accepted by the council the adjudication shall not bind the city nor operate as an engagement or contract.

"(Signed) J. HENRY BEHAN,
"*Administrator of Commerce.*"

53 And now the said Frederick Wintz, as president aforesaid, declared that he does, by these presents, in his said capacity, bind and obligate the said New Orleans City Railroad Company, its successors, assigns, transferees, and vendees, at all times, to abide by, comply with, conform to, and observe all and singular the terms, conditions, clauses, stipulations, regulations, and penalties of the said specifications, and to enjoy and exercise the herein-conveyed right of way strictly in accordance with the said specifications.

This sale, in conformity with the proposal made by the said New Orleans City Railroad Company and accepted by the city of New Orleans, is made and accepted, for and in consideration of the price and sum of six hundred and thirty thousand dollars, for the full term and period hereinabove fixed and determined, payable cash.

Now, therefore, in conformity with the terms of the present sale,

and it being the true intent of the city to make delivery hereby, and the said New Orleans City Railroad Company being in full possession and acknowledging *as* the said Frederick Wintz as president aforesaid, does hereby acknowledge, for and in the name of the said New Orleans City Railroad Company, due delivery of all the property, cars, fixtures, and other appurtenances belonging or in anywise appertaining to said railroad lines. The said Frederick Wintz, as president of the said New Orleans City Railroad Company, has paid cash the said sum of six hundred and thirty thousand dollars ($630,000) into the department of finance of the city of New Orleans, as appears by the receipt of the administrator of finance, hereto annexed for reference.

And the said mayor, Isaac W. Patton, declared that by virtue of the authority in him vested by the said resolution No. 6148, admintration series, he does, by these presents, in his said capacity, and for and in the name and on behalf of the city of New Orleans, acknowledge that the payment of the said purchase price has been duly made by the said New Orleans City Railroad Company; that he does hereby accept the payment of the said purchase price and give full and ample acquittance and discharge for the same.

54 Thus done and passed in New Orleans, at my office, the day, month, and year first above written, in the presence of Minor Martin Elmore and William H. Hyatt, competent witnesses, who have signed with the said parties and me, notary, after reading the whole.

(Original signed)

I. W. PATTON,
Mayor City of New Orleans.
F. WINTZ,
President N. O. City R. R. Co.
MINOR M. ELMORE.
WILLIAM H. HYATT.
G. LE GARDEUR, JR.,
Notary Public.

A true copy of the original on file and on record in my office.
New Orleans, Oct. 3d, 1879.

G. LE GARDEUR, JR.,
Notary Public.

Endorsed on cover: Louisiana supreme court. No. 1132. The New Orleans City and Lake Railroad Company, plaintiff in error, *vs.* The City of New Orleans. Filed September 25, 1888.

FILED
OCT 29 1891
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1132.

THE NEW ORLEANS CITY AND LAKE R. R. CO.,

PLAINTIFF IN ERROR.

versus

THE CITY OF NEW ORLEANS.

BRIEF FOR PLAINTIFF IN ERROR,

CHARLES F. BUCK,
for Plaintiffs in Error.

A. W. Hyatt Stat'y Mfg Co., Limited, 73 Camp street, N. O.—56,919.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1132.

THE NEW ORLEANS CITY AND LAKE R. R. CO.,

PLAINTIFF IN ERROR.

versus

THE CITY OF NEW ORLEANS.

BRIEF FOR PLAINTIFF IN ERROR,

To the Honorable the Judges of the Supreme Court of the United States:

This is a suit or proceeding instituted by the treasurer of the city of New Orleans in behalf of said city, to recover from the defendant, plaintiff in error, the sum of twenty-five hundred dollars ($2500) annual license for the year 1887, "for *conducting the business of carrying on and running a horse and steam railway for the transportation of passengers within the limits of said city, without having obtained license for said business from the city of New Orleans for said year.*"

Under special laws permitting summary proceedings in such cases, suit is commenced by a simple motion, and the defendant, plaintiff in error, ordered to show cause ten days after service, Sundays and holidays being excepted, why she should not pay to the city of New Orleans $2500 "for a license for the privilege of conducting the above mentioned business during the year

1887, penalties ten per cent. per annum until paid, and cost of these proceedings, *or be restrained from carrying on said business, until said license, penalties, fees thereon, and costs of court be paid.*''

The order concludes with the prayer that judgment should be rendered accordingly, and that an *injunction restraining plaintiff in error from carrying on business be perpetuated*'' (printed transcript, page 3).

Defendant appeared and answered, admitting that it operates a street railroad in the city of New Orleans and that its receipts amount to the sum charged—the licenses being graduated on gross receipts—making her liable for license of $2500, if liable at all.

For special defence the company set up the unconstitutionality of the act of the Legislature under which the license is claimed, or rather, the ordinance of the city of New Orleans passed under authority of said statute; but more especially,—and that is the defence presented to this Court,—defendant pleaded (Answer, transcript, page 4):

"*That the business, as conducted by it, is not a trade, profession, vocation or calling,* in the sense in which the license tax is imposed upon such trades, professions, vocations or callings, but simply the exercise of a privilege accorded to respondent by the city of New Orleans for a valuable consideration to use the public streets or highways of the city of New Orleans for street railroad purposes, as a convenience to the inhabitants of the city, transporting them from various points within it for a money consideration; that the grant of said privilege or permission is, on the part of the city of New Orleans, a sovereign and legislative act, by which it establishes the uses to which the public streets within its jurisdiction may be subjected, and no person, or persons, or corporations, without having previously obtained such permission, can use the streets for such purpose or engage in said business, so called, of operating street railroads; that said privilege was confirmed to respondent by a written contract executed with the New Orleans City Railroad Company on the 2d of October, 1879, for a period of twenty-five years, ending on the 1st of January, 1906, and for which respondent paid to the city of New Orleans the sum of six hundred and fifty thousand dollars in cash; and on the 9th of June, 1883, this respondent, the New Orleans City and Lake Railroad

Company, acquired the rights, property and privilege of the New Orleans City Railroad Company, extinct.

"Respondent avers that the ordinance of the city of New Orleans, in so far as it purports to impose a *license tax* upon this respondent, and the act of the Legislature, in so far as it purports to authorize the city of New Orleans to such action, so far as it affects this respondent, is null, void and inoperative, as impairing the obligations of the contract hereinabove set ont, and therefore violative of Article 10 of the Constitution of Louisiana, Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 10, Article 1 of the Constitution of the United States.

"That under said contract passed between it and said city, respondent acquired a fixed and vested right for the consideration then paid to operate street railways through the particular streets of the city designated therein, and for the time therein specified, and the attempt to impose a LICENSE TAX upon said company is a violation of the letter and spirit of the contract, prohibited by the fundamental principle of right as expressed in the constitutional provisions hereinbefore set forth.

"That payments heretofore made were made in error and under this (mis) apprehension of their legal rights under the contract referred to.

"Wherefore respondent prays for the dismissal and rejection of mover's demand, with reservation of the rights to sue for recovery of payments of license made to the city of New Orleans, and as in duty bound," etc.

This defence was overruled by the Supreme Court of the State (printed transcript, page 10), substantially on the laconic and extraordinary reason that the privilege of the right of way to operate street railroads, termed "a franchise," becomes, when granted, property susceptible of incumbrance and conveyance, quite distinguishable from the privilege of enjoying the right, which, the court say, is "vivified only on the payment of the proper *license to the city:*" and the company is to be *enjoined*, unless the license is void.

From this finding the company prosecutes an appeal to this court, and trusts to be able to show that the attempt to impose a license tax upon this plaintiff in error, is a most flagrant impairment of an obligation solemnly contracted by the city of New Orleans in her sovereign capacity, and for a valuable—an enormous—consideration.

The city ordinance, No. 2035, under which the license is claimed, is not in the transcript. Its absence is fully accounted for by the following *agreement of counsel*, found at page 13, printed transcript, to-wit:

"*It is further agreed that inasmuch as the* LICENSE ORDINANCE *of the city of New Orleans is a* VERBATIM ET LITERATIM *copy of the State license law, Act No. 101, of the Legislature of 1886, said ordinance shall not be copied into the transcript, but shall be used and referred to as contained in the published acts of the State of Louisiana.*"

This "duplication" of text in the State law and city ordinance, springs from the following article of the constitution of Louisiana, which we beg to submiti n full, as we may have occasion to refer to it, for another purpose.

ART. 206. "The General Assembly may levy a license tax, and in such case shall graduate the amount of such tax to be collected from the persons pursuing the several trades, professions, vocations and callings. All persons, associations of persons, and corporations pursuing any trade, profession, business or calling, may be rendered liable to such tax, except clerks, laborers, clergymen, school teachers, those engaged in mechanical, agricultural, horticultural and mining pursuits and manufacturers other than those of distilled alcoholic or malt liquors, tobacco and cigars, and cotton seed oil. *No political corporation shall impose a greater license tax than is imposed by the General Assembly for State purposes.*"

The sentence in *italics* explains why the City Council simply enacts the State law, as an *ordinance.*

The statute, being Act No. 101 of the acts of the Legislature of Louisiana of 1886, page 165, has the following title:

"To levy, collect and enforce the payment of an annual *license tax* upon all persons, associations of persons, or business firms and corporations, pursuing any trade, profession, vocation, calling or business, except those who are expressly excepted from such license tax by articles 206, 207 of the constitution."

The act embraces a lengthy enunciation of all conceivable trades, callings, etc., and "graduated" the license according to receipts. The license in this case is claimed under section 8th, being headed "*Carrying and Storing,*" which provides as follows:

Sec. 8. *Be it further enacted, etc.,* That every omnibus, or

regular coach or herdic business, and for every business of transporting money, merchandise or other articles, by express or transfer, of operating one or more towboats or tugboats. of keeping a warehouse or storage room, the license shall be based on the gross annual receipts of said business, as follows, except railroads running outside of cities and towns. There shall be no class of this business higher than the tenth class; when said receipts are five hundred thousand dollars, or more, the license shall be $400."

It will be observed that street railroads are not mentioned at all in this section, and only in a second proviso thereof at page 175, act of 1886, it is enacted and provided that "*for the business of carrying on, operating, or running any horse or steam railway, or both, for the transportation of passengers within the limits of any city or town in this State an annual license shall be taxed, based as follows:* 1st. When the annual gross receipts are five hundred thousand dollars or in excess of that amount, the license shall be two thousand five hundred dollars ($2500)," etc.

This is the license for which plaintiff in error is liable, if at all.

The place and form in which it appears in the act, of course, has nothing to do with its effect, but we call attention to it, because, verily, it looks as if this *proviso* were an afterthought, injected as a chance shot; for the Legislature—the legislators at least—knew full well the conditions under which "street railways" were operated in the city of New Orleans, for instance; and "street railways would seem to naturally follow in connection with omnibus or regular coach or herdic business."

But these laws nor their constitutionality, tested by the laws and constitution of the State of Louisiana, are not here for review or interpretation, except as to the question whether the attempt to enforce them against the plaintiff in error impairs the obligation of the contract rights as against the city of New Orleans.

We have quoted them as necessary to a full and intelligent comprehension of the facts and developments of the case.

The very fact that we are here involves the admission that the *terms* of the statute embrace the plaintiff in error; without

that this court would find nothing on which to rest its jurisdiction.

This brings us to the contract between the plaintiff company and the city of New Orleans.

This contract is found at pages 26, *et seq.*, printed transcript.

It contains, as necessary recitals, all the preliminary acts, ordinances, publications, etc., which preceded its final execution.

We must examine this contract, which is described as "a sale of right of way and franchise," for the purpose of ascertaining what it is that the city *sold* and what it is that was *bought* by the plaintiff in error.

Did the company pay six hundred and thirty thousand dollars ($630,000), in cash, to have "*conceded*" (?) to it, as it is expressed in the opinion of the court *a qua*, "*the right to lay rails and do all necessary work on the streets designated, toenable the grantee to exercise the right of way to operate a street railway*" (transcript 10), or did it pay for the right to *operate* street railways as well as to lay the tracks necessary for that purpose?

If it bought the latter right—a *thing* which under the legislation and jurisprudence of Louisiana is described as "property susceptible of encumbrance and conveyance"—as such assessed for purposes of ordinary taxation, then, clearly, the State of Louisiana and the city of New Orleans are exacting a license—*a permission*—tax for that which, for a valuable consideration, they sold us the right to do.

The contract is explicitly a contract of sale of the right to construct and operate street railways. The license ordinance purports to impose the license for the "business of carrying on, operating or running any horse or steam railway, or both, within the limits of any city," etc.

We shall find on examining the contract that this "*ipsissimis verbis*" is the very thing which we bought the right to do.

ON THE CONTRACT.

It may be of assistance to the Court to have before it, somewhat summarized, the main features of the contract; prefacing its review with the observation that from the context and recitals in decisions of the Supreme Court of Louisiana, if not from direct testimony, it will appear, and is the fact, that in regard to grants of this character as that from which this controversy springs, the city of New Orleans has always acted and proceeded as in the contract on which we rely; that is to say, she first, by ordinance, decides to offer "right of way to construct and operate street railways through certain designated streets in the city;" prepares the specifications for the construction of tracks and conditions upon which the street railways are to be operated; the time of day and the intervals at which the cars shall run; the points from and to which; the amount of fare to be charged, and the period of time or number of years for which the franchise will be offered. Public notice is then given, and the franchise is offered and sold for a block sum in cash, paid when the adjudication is confirmed and the contract formally entered into.

To return now to this particular contract. It informs us, at the outset, that the New Orleans City Railroad Co., assignor of the present plaintiff, had enjoyed the rights of way which the latter now owns for a period of time preceding the date of the existence of the contract, and the notice given first recited in Ordinance No. 4968, embodied in the contract and found on page 26 of the printed transcript, commencing as follows:

"Whereas the franchise granted by the city of New Orleans to the New Orleans City Railroad Company for *running certain lines of railroads* (we ask comparison of this wording with the terms of the law) will expire in 1880; and whereas, it is necessary to give ample time to all parties who may desire to make bids or proposals for said franchises at the expiration of the time for which said franchises were granted by the city, therefore, be it

Resolved that the Administrator of Commerce be and is

hereby authorized to advertise until the 1st of July, 1879, in the commercial journal of the city and also in one of the journals of the cities of New York, Philadelphia, Chicago and St. Louis, for sealed proposals for a period of twenty-five years from the respective dates of the expiration of said franchise granted by the city of New Orleans to the New Orleans City Railroad Company, to-wit": etc., etc.

Then follows a description of the roads or lines and streets through which same are to be operated.

The ordinance concludes as follows, page 27, to-wit :

"That the terms of said *sale* shall be set forth in specifications to be drawn up by the Administrator of Commerce with the approval of the Council and to be filed in the office of the Administrator of Commerce as soon as practical."

We make these extracts from the contract, calling attention to the phraseology italicized, not only to inform this Honorable Court of its contents, but more especially to prove by its own terms that it is a contract of sale of the right to construct and operate street railways, in the very terms of the statute which seeks to impose a license as a condition precedent to running the cars.

In ordinance 5020, page 27, the proper officer was instructed to advertise for sealed proposals "*for the sale of the franchises of the railroad lines named, etc.*"

The specifications above referred to as being "on file," and which announce the conditions under which the sale is to be made also embodied in full in the contract, beginning at page 27, printed transcript.

Among the more important stipulations are the following

The city of New Orleans in this contract, and in all similar contracts, and especially in those to which reference is made, which existed between her and the New Orleans City Railroad Co., and which expired on the date from which the new franchise is to be granted, had what is called in the contracts, "a right of reversion," amounting, however, to nothing more than a right to acquire ownership of the roads and property appurtenant thereto, on the payment of a price to be agreed

upon according to stipulations contained in said contracts. This right of reversion the city agrees to transfer to any purchaser; apparently an important and essential step in placing in possession any one who shall become purchaser other than the company owning these roads, fixtures and appurtenances.

From this it appears that the city even contracted or obligated herself to put the purchaser in possession of tracks, running apparatus, etc.

Can this be held to be a sale of the right to construct street railroads *without the* right to operate them, as the decision of the State court puts it?

The franchise is to be sold for cash, the *entire* price to be paid by the purchaser or purchasers at the time of the delivery of said franchise or franchises.

The delivery to be made by the signing and delivering of an act of transfer and "*by placing the purchaser in actual possession.*"

The purchaser assumes the obligation to keep in repair the streets and bridges through which the lines of road pass, from curd to curb.

The specifications provide the rates of fare to be charged.

"The city reserves the right to reject any and all bids, and *sale and adjudication* shall not be considered binding upon the city of New Orleans until the purchaser or purchasers shall have paid, delivered and deposited the full amount and price of the bid with whomsoever she, by her mayor, to receive same for and on behalf of the city."

The contract continues with the recital that, accordingly, bids were received, and by Ordinance 6148, that of the New Orleans City Railroad Company, for $630,000 cash, accepted, and the mayor authorized to sign the necessary contract.

In the contract now before us, the city reserved a similar right of ~~reservation~~ reversion (transcript, page 29) that she had under a formal contract; several pages of the contract are devoted to specifications as to the tracks, cars, equipments, and obligations in regard to repairs to streets, assumed by the purchaser.

The contract stipulates that the fare shall not exceed five (5) cents for passengers on various lines within certain limits (pages 32 and 33); prescribe the style of cars, etc., reserving the right to the Council, however, to make changes; also the motive power, that it shall be horse or mule power; provides the schedule of time fixing the minimum intervals between cars, etc.

An express stipulation is introduced into the contract that the road and fixtures shall be assessed for taxation to pay the rate of tax levied upon real estate.

The speed of cars shall not exceed six miles per hour.

Out of an abundance of precaution it is even stipulated that "*these rights of way are for street railways, carrying passengers only.*"

And finally, to show the absolute nature of this contract, as a contract of sale of a specified, well-defined *thing* for a fixed price, being the right of running and operating the road for profit, in order to protect the purchaser and at the same time probably to enhance the price which the city expected to realize, it was stipulated (transcript, page 34):

"*The city of New Orleans binds herself not to grant for the period for which the said franchise is sold a right of way to any other railroad company upon the streets through which said right of way is hereby sold, unless by mutual agreement between the city and the purchaser of this franchise.*"

In conclusion on this examination of the contract, we quote the declaration of the mayor, which defines its nature and essence. He declares, transcript, page 29, "*that he, by these presents,* in his said capacity, for and on behalf of the city of New Orleans, grants, *bargains, sells, conveys, transfers, assigns and sets over* unto the said New Orleans City Railroad Company the rights of way and franchise of the following *roads*, etc."

These were *operating, running* roads,—the tracks, fixtures, appurtenances and running appointments the city had, as we have seen, the right to buy, and she *sold* the right to continue to

"run and operate them," proclaiming her capacity to give possession, from the fact that she had the right to acquire tracks, fixtures and appurtenances.

And yet we are told she sold the "lifeless" right of way to build tracks, without the right to operate them!

When the city sells the franchises "*for running certain lines of railroad (which) will expire in 1880,*" (contract, transcript, page 26), it may be conceded that the idea is not expressed with the complete precision with which Addison would have given it; yet it is so clear that no one could misunderstand it. Street cars were being run, by a company, on rails laid in the streets, for profit; the city offered for sale the right to continue to "run" them for a period of twenty-five years more.

ARGUMENT.

Now, is the operating a street railroad for conveying passengers, under the above contract, a "business" within the sense and meaning of the statutes referred to, and if it be and the statutes *intend* to embrace it, is not this an impairment of of the obligation of the contract?

Can it be right? is it just? is it permitted to the city of New Orleans and the State of Louisiana—for the city is but the agent of the State in this matter—to *sell*, by ordinary contract, a *thing* for valuable consideration, the value of which is exclusively in its *use;* and then, in the language of the Supreme Court of the State, to say that that *use*—"the privilege of enjoying the right"—the very thing I have bought, is only *vivified* by the payment of a license tax, the amount of which is beyond the control of the purchaser and in the power of the vendor.

This means that the city has sold a right to lay tracks and to construct railways, which are really intended as public conveniences, but the purchaser of this right may stop at that; he is not bound to "run cars," to operate the road; he may do so at his option; provided, he pays a license. Is not this obviously conducting to an absurdity as well as to a wrong?

The street railways are permitted as public conveniences. The municipal authorities derive their power to permit them from the theory that the public and the public use is benefited.

The "purchaser" is bound to run his cars: to run them for the convenience of the inhabitants, at fixed intervals, and for a rate of fare determined in the contract.

Failure to comply or material variance would lead to forfeiture.

The right to operate a "street railroad" in the city of New Orleans is a franchise derived from the sovereign; can only be exercised by its permission, and when it *sells* this permission for valuable consideration, it becomes a contracting party and can impose no conditions not embraced in the contract. An ordinary calling, avocation, trade or business is pursued at will, subject to general law and possibly the payment of a license tax or "license for permission," but every one willing to pay the license has the absolute right to engage in the pursuit.

It needs no argument to show that no one can operate a street railway on these conditions only.

The history of the origin of street railways, the authority and conditions under which they are operated, the legislation and jurisprudence in Louisiana in regard to them, show that the maintaining and operating them is not an ordinary business open at will to all, in the sense of the laws imposing a license tax on "trades, professions and callings:" Art. 206, Constitution.

These railroads can only be operated over and through the public streets of cities the use and enjoyment of which is primarily in the public at large, for well understood, general and equal facilities. It was indeed contended that to permit tracks to be laid and cars to be run was a destruction of the street as a public thoroughfare, an injurious and unwarranted deprivation of the rights of the general public, and that, therefore, the authorities could not grant such a permission. Duplessis vs. Brown, 14 An. 842, 843.

It is of some importance to bear in mind that when this decision was rendered, the legislative authority of the City Council, in this regard, rested on mere implication; whereas, subsequently, the power to sell these "permissions" or "franchises" was expressly conferred, and is now even recognized, if not expressly, by clear implication, in the constitution of the State.

The case, however, contains several dicta bearing on the inquiry as to the nature of the *property* or right *sold* by the city to the grantee.

In the first place, as we might naturally expect, throughout the decision runs, as the dominating principle, the idea that the rights which are guaranteed to the public in "streets, public walks or quays," etc., etc. (Revised Civil Code, articles 454, 455, 458), are subject to regulation; the use being public, but not of a particular mode. From this the conclusion is deduced that the city of New Orleans might herself lay rails in the street for the use of such as would choose to avail themselves of them, and no one would have the right to complain so long as other and usual modes of traversing streets would not be prevented. Then follows naturally the next step in the conclusion, which we quote in full (14 A., page 843):

"If it does not suit the public coffers, or the public convenience, that the city should lay rails for the *free* use of the public (italics ours), it follows from the premises that the city has the *prerogative* of selling the right of way for a specified time to one or more persons, *who shall lay rails and have the privilege of running cars, drawn by horses or mules*, according to a tariff fixed by the Council."

This the city has been doing ever since, deriving large sums of money from the sales. It is what she did in this case, and for an enormous price. It is matter of simple arithmetic to show that $630,000, cash *in advance*, for a thing the value of which distributes itself over twenty-five years, runs into the millions.

In the case of "*Board of Liquidation vs. The City of New Orleans*," 32 An. page 915, the nature of the right called into

existence by such a grant of sale of right of way, is clearly and unequivocally defined.

The permission thus given has been and is properly called a franchise, and this franchise lying "in embryo" in the sovereign control which the city has over the streets, becomes a real tangible thing of value when, by the exercise of the authority vested in the municipal government, it springs into existence. It then becomes a "thing" that may form the subject of a contract, and having a value it becomes *property*. 32 An. above cited. Sold and transferred to another, for a valuable consideration, it remains property in the hands of the vendee, and is assessed as taxable property, which, *en passant*, is regularly done against the plaintiff, who pays an annual tax of 2 per cent. for municipal and of 6-10 of 1 per cent. for State purposes.

So, we contend that what the city sold to us is the very *thing* we are using, the very business we are carrying on—the right to operate the street railways.

And in doing this she acted in her sovereign governmental function, exercising her power of control of the public streets, in the interest of the whole people; and with reference to their advantage and convenience. And she gave to her permission, given for value, the sanctity of a formal contract, which the constitution of the country will not allow her to violate or impair.

She even *warranted* an *exclusive* title,—promising not to make similar grants to any other person. Can this, then, be a trade or business, in the sense of the law, open to all? Impossible: it is prohibited, in terms, to all but plaintiff in error.

It seems to us we might rest the case right here. The language of the contract is so explicit; the nature of the thing sold so obvious; the demonstration so complete that this was "the right of running street-railway cars" for the carrying of passengers "within city limits," that nothing can be added to it.

If any further demonstration is necessary we find it in the

decision of the Supreme Court of the State of Louisiana, in the case of Board of Liquidation vs. the City of New Orleans, 32 Ann. page 915, already referred to.

In this case the nature of thing or right created by the city when she sells a franchise to run street railroads, is defined and held to be exactly what we claim it is, complete and perfect in itself—*property* in the hands of the vendee. endowed with all the privileges attending full and unincumbered ownership.

For the convenience of the Court we quote the text nearly in full. The case explains itself. This is the *syllabus* of the case:

"Under the laws, which make it the duty of the City Council of New Orleans to turn over to the Board of Liquidation of the city debt, all the property, real and personal, of the city, to be by said board sold or disposed of, and the proceeds applied to the payment of the city debt, the City Council cannot sell or grant the right of way through any of its streets to a railroad company, unless it is for a consideration in cash or otherwise, which can be realized and turned over to the Board of Liquidation and by them applied to the payment of the city debt.

"The power of garnting this right of way or franchise, is inherent in the city itself and not susceptible of transmission to the Board of Liquidation; but when the power has been exercised by the city, the result of it, the franchise, then becomes property in the legal sense of the word, and the price, consideration or proceeds of same should, under the statutes, be transferred to the Board of Liquidation."

FROM THE OPINION.

"It appears that on the 9th of June, 1880, the council of said city passed Ordinance No. 6523, authorizing the Administrator of Commerce to advertise in the official journal for sealed proposals for the extension of any one of the railroad lines above Canal street, through certain streets, below Canal street, the extension to be made under and according to specifications on file in the office of said administrator.

"Relying upon Act No. 133 of 1880, the object of which is to liquidate the indebtedness of the city of New Orleans, and to apply its assets to the satisfaction thereof by the agency of a syndicate, and grounding themselves more particularly upon section 5 of that law, as also upon section 10 of Act 31 of 1876, the plaintiffs, constituting the Board of Liquidation created by the Act of 1880, claim that they alone, and not the city, have

the power of disposing of the right of way in question, and this on such terms as they may deem favorable. For the preservation of this power, they have applied for and obtained an injunction forbidding the city and the administrators thereof from carrying out the provisions of the ordinance above. The prayer of their petition concludes by asking: "that it be decreed that said City Council" shall have no power to sell or dispose of said franchise, and that the power is exclusively in ihis board."

"The city has filed an appearance denying the pretensions of the plaintiffs, contending that she alone has the power of disposing of such rights, and that she can do so in the mode proposed by the ordinance, which does not contemplate the payment of money.

"The theory upon which the plaintiffs proceed is:

"First. That the power of disposing of the right of way which the city proposes to exercise, is property:

"Second. That it is property within the meaning of Acts 31 of 1876 and 133 of 1880:

"Third. That being such they have the exclusive power of disposing of such right:

1. "Is the power to dispose of the right in question property?

"The City of New Orleans is a political corporation, a State functionary, susceptible of acquiring rights and incurring obligations. It can own and acquire property. It can incur debts and liabilities. In 1870 all the rights of the previous city were transferred to, and all the obligations of that corporation were fastened upon, the new organization then created. The rights so conveyed emanate from the State, which, in the exercise of its sovereignty, has delegated them. They have not, on that account, lost their character, which, on the contrary, was preserved in its integrity, Among the rights thus delegated and conferred, is found that of regulating and making improvements to the streets, public squares, wharves, and other public property, and of regulating the proper government of locomotive, passenger and street cars which run within the limits of the city; in other words, the power of regulating the police of said city in all its departments, particularly as concerns the streets and avenues within corporate boundaries, which is an attribute of sovereignty which it alone can exercise."

"Streets, public walks and quays are things which belong in common to all the inhabitants of cities or other place, and to the use of which all the inhabitants of a city or other place, and even strangers are entitled in common. R. C. C. 453, 458; Brown vs. Duplessis, 14 A. 854–7.

"State ex rel. Gas Light Co. vs. New Orleans, not reported, No. 7661 Docket Supreme Court in New Orleans.

"The power of granting the right of way, in embryo, is valuable. It could not be transferred by the city, unless the city herself could have exercised it. Nemo plus juris ad alienum transferre potest, quam ipse habet.

"It is true that it cannot be the object of any appraisement, because, in itself, it is absolutely barren and unproductive. It is only when it has been exercised and consummated, and when it has become the object of a contract, that the privilege transferred acquired a value susceptible of appreciation.

"The mere right to grant this privilege, as long as it has not been exercised and transferred, has never had, and never can acquire, an intrinsic value. It is only the result of the exercise of the right which, upon springing into existence, becomes property, and hence acquired a value nominal or real. It then becomes what is known or termed a franchise, which has an incontestible value, and is property even subject to taxation.

"To make the exercise of such power valuable, it requires that the privilege be actually transferred. and that the rights which it confers be accepted; it demands the concurrent and consummated action of both transferrer and transferree, precisely as it takes the double action of heat and water to produce or create steam, which is only the result, the creature of such action.

"The power to dispose of a franchise, being an attribute of sovereignty, is one which no intrinsic authority can put in motion, and which requires as a *primum mobile* the volition of the being in whom it was vested, which is, in the present instance, the city of New Orleans. It is not susceptible of transfer. It is a delegated power, which, under no circumstances, can be delegated in embryo, without express and special authority from the grantor. *Delegata hæc potestas non potest delegari.*

"II. The exercise of such power, when consummated, can create property, which, when so engendered, forms part of the property(the nature and extent of which was in legislative contemplation when Acts 31 of 1876 and 133 of 1880 were framed and adopted.

We submit, therefore, the "running of cars" on the tracks of the company, plaintiff in error, is not a common business open to all, embraced in the license laws of the State. It is but the exercise of the *right*, acquired by contract. The Company does nothing but what, under her contract, she is not only permitted but compelled to do.

In the language of the *Duplessis Case*, 14 An. 842, the city sold to the R. R. Co. the right to do what she herself might do upon these streets; it seems impossible that the exercise of this right, prevented to all the world beside, should be held to be the pursuit of an ordinary trade, calling, business or profession, subjecting the purchaser to a license tax for carrying it on.

The City, as we have seen, reserves the right of reversion to roads and fixtures; let us suppose that she became the owner of them, but instead of operating them, sold their use from year to year to the highest bidder, imposing her conditions for regulation, etc. Would any one contend that the purchaser was subject to an annual license tax "for running cars," besides the price paid for the privilege of doing so? It is like a delegation of part of the city's prerogative power and privilege; and vested in another, for a valuable consideration, it must exclude all other obligations, as it excludes all the world, from the exercise of the rights.

We submit, therefore, that the business in which the City Railroad is engaged is of a public character, delegated by the municipal authorities; that it consists in the exercise of the "franchise of running cars through the streets"; that this right of running cars is the very thing that was sold to us for a term of twenty-five years and the use or enjoyment of this right, coming as it does, from the sovereign himself, cannot be called the pursuit of an ordinary trade, calling, business or avocation, in the ordinary course of things, the right to follow, which is inherent in every person in the State.

It is no answer to this argument to say that the license act specifies "the business of running cars" through the streets, to carry passengers for hire as subject to a license tax. The law must be construed according to its general intent, and where it should happen that any one is engaged in the business of "running street cars, or operating street railways, under possible conditions, of a general character, if such a thing can be con-

ceived possible, there is no reason why a license should not be exacted. But if the object and intent of the law be to subject to license such companies or persons as the defendant, plaintiff in error, operating under such contract as she has with the city, then it must fail, because, to that extent, it impairs the obligations of a solemn contract, which, the federal constitution expressly forbids.

It is in point to remember that if this company is subject to a license tax at all, the amount of that license is wholly in the power of the Legislature: if we can be made this year to pay $2500, next year it may be $5000 or $10,000, and the company thus would be, indirectly, deprived of the value of that which it acquired by purchase.

In conclusion, it will not be considered a reflection upon the Supreme Court of the State of Louisiana, to call attention to the natural tendency of all State tribunals to protect the *fisc* of their respective jurisdictions.

The Reports of this Court show how pertinaciously State courts have found ways to uphold taxation against claims for immunity under the very articles of the federal constitution which we now invoke. This great tribunal has always been equal to the emergency, and free of all trace of prejudice or predilection, has at all times applied and enforced the wise and conservative restraint imposed by the articles of our constitution, in this regard.

Section 10, of Article 1, which provides that no State shall pass laws impairing the obligation of contracts, is the pledge of all the people of this nation that public faith shall be maintained, and justice between the citizen and the State shall be equal and even-handed.

This is a proper case for this high tribunal to interpose its protective power.

The State, through her agent, the municipal corporation, has, by solemn contract, created and awarded a valuable right. Now, by the exercise of sovereign power, she seeks to impair, to destroy that right. We appeal to this Court, in the name of the fundamental law of the land, to prevent this wrong.

Respectfully submitted,

CHARLES F. BUCK,

for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED,
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JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1888—No. 1132.

OCTOBER TERM, 1891—No. 119.

THE NEW ORLEANS CITY AND LAKE RAILROAD CO.

PLAINTIFF IN ERROR,

versus

THE CITY OF NEW ORLEANS.

Supplemental Brief for Plaintiff in Error.

In the brief already on file we rested upon the intrinsic conditions of this case as suggesting at once the principles which are to be applied to it.

Before this high court, which decided the famous *Dartmouth College* case and others, involving the same great principles, it was not deemed necessary to argue the constitutional question involved, except to show a case, which, in its nature, calls for its application.

Hence, we refrained from reviewing the jurisprudence of this Court. We felt, as the line of argument may show, that we might, with Mr. Justice Swayne, in the case of *Farrington vs. Tennessee*, 95 U. S. 678, have said :

This case lies within narrow limits. The question to be decided arises under the Constitution of the United States. The ground of this discussion has been well trodden by our predecessors. Little is left to us but to apply the work of other minds. The facts are agreed—(substitute "not disputed")—by the parties.

Some further examination, however, in the field of the jurisprudence established by this Court, on the question of the protection of "vested rights," under the Constitution of the United States, has led us to the case of Gordon vs. Appeal Tax Court, 3 Howard, marginal page 145, etc., which is so nearly parallel to the case at bar, that the difference between them is but nominal; in that case the question arose whether a banking franchise, having been obtained for valuable consideration was subject to ordinary taxation? In this case it is attempted to impose a *license* tax—a license for revenue.

We respectfully submit that, under the decision in the case above referred to, the attempt involves an impairment of the obligation of the contract.

Cooley "On Taxation," page 403, says:

"License fees may be imposed: 1. For regulation; 2. For revenue; 3. To give monopolies; 4. For prohibition.

He disposes of the *third* and *fourth* by saying that "the former is not admissible in a free country;" the latter directed only against "pursuits or indulgences, which in their general effect are intended to be more harmful than beneficial to society, and which, consequently the public interest requires should be put an end to."

Clearly, the license fees demanded by the city does not fall within either of these classes.

It must then be "for regulation" or "for revenue."

It is not for "regulation" for two reasons:

First—Because the business is *regulated* by the provisions of the contract; and

Second—For the best and simplest of reasons, that the license fee claimed is in the terms of the law, a license for revenue or a license tax.

And combined with the object to reap revenue, is a prohibition.

The law provides that parties subject to license may be *enjoined* from carrying on their business until the license is paid.

We are actually so enjoined, see judgment, Trans., p. 7.

The city therefore demands an increase in addition to the price paid under penalty of stopping the plaintiff in error from exercising the right or franchise conveyed to it.

That this should not be done, this Honorable Court decided in the case above referred to.

We need not attempt to *interpret* the decision; the point clearly and distinctly arose whether a *franchise*, for which a price was paid, could be taxed without impairing the obligation of the contract. This court answered the question in the negative.

In that case, as in this, the clamor was made, "the franchise being property, why should it not be taxed like *all* property?"

This illusive theory was met by a practical and direct answer.

For your Honors' consideration, we submit extracts in point from the opinion, *in extenso*, from page 146:

"It appears from the acts of 1812, 1813 and 1821, that the Legislature which passed them had in view the construction of the Cumberland and Boonsborough turnpike roads, and the establishment of a school fund. That they designed to accomplish those objects by making some of the banks construct the roads, and all of them contributors to the school fund, as the price for their charters. A round sum, or an annual charge, with or without reference to capital stock, may be asked by a legislature for such a franchise. It may be more convenient to the banks to have such a consideration or bonus distributed through the years of ther corporate existence, than to pay its equivalent in advance. This opinion was given to the old banks. Being so given, it is conclusive that the legislature intended the annual tax or charge upon the capital stock of the banks to be the bonus or price, or part of the price as to some of them, that they were to pay for the prolongation of their franchise of banking. When the banks accepted the acts by choosing to pay the annual charge instead of the stipulative alternative, it is plain that they thought so too, and that they understood in that way the contract between themselves and the State. Either was a condition to be accepted and complied with before the charters were to be extended. *Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax*

upon the franchise. But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the State? was repeatedly asked in the course of the argument. The reason is, that everyone buys land, subject to his own apprehension to the great law of necessity, that we must contribute from it and all of our property something to maintain the State. *But a franchise for banking, when bought, the price is paid for the use of the privilege while it lasts, and any tax upon it would substantially be an addition to the price.*"

Again, at page 147 :

"The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price for the prolongation of their franchise of banking. The power of the State to lay any further tax upon the franchise was exhausted. That is the contract between the State and the banks. It follows then, as a matter of course, when the legislature go out of the contract, proposing to pledge its faith, if the banks shall accept the act, not to impose any further tax or burden upon them, that it must have meant by those words an exemption from some other tax than a further tax upon the franchise of the banks. *The latter was already provided against.* To confine the pledge to any further tax upon the franchise surrenders the whole clause as a substantive enactment, to a supposed needless declaration of the legislature, *that it would not do what it had stipulated by its contract not to do.* The faith of States is never pledged but for some substantial end, within the competency of their legislative powers."

How much stronger than this case are the conditions of the one now under consideration? We are asked to pay a license, annually, for doing that which we bought in express terms the right to do : "running cars and carrying passengers," etc., for hire, on tracks laid in the public streets; and we are asked to pay the license or be *perpetually enjoined* from exercising or using the privilege for which we paid, in cash, and in advance, for twenty-five years, the enormous sum of six hundred and thirty thousand dollars.

This Court will forbid the wrong, in the name of the Constitution of the United Sattes, as it has consistently done whenever appealed to in a proper case.

Respectfully submitted,

CHAS. F. BUCK,

For Plaintiff in Error.

Office Supreme Court U. S.
FILED,
DEC 4 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

THE NEW ORLEANS CITY AND LAKE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW ORLEANS.

SUPPLEMENTAL BRIEF.

FIRST, STATEMENT OF FACTS; SECOND, ASSIGNMENT OF ERRORS; AND, THIRD, SYLLABUS OF POINTS ARGUED BY COUNSEL FOR PLAINTIFF IN ERROR.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

In more strict compliance with rule 21 of this honorable Court, I would respectfully submit to the Court concisely, and with reference to the fact that necessarily it must be a repetition of what is already contained in the brief, in a general way, the following more connected

Statement of Facts.

The plaintiff in error, The New Orleans City and Lake Railroad Company, is the successor of the New Orleans City Railroad Company, and acquired from it all its property, rights, and privileges, especially the right of way and privilege of "running street cars" and operating "street rail-

ways" on various streets in the city of New Orleans, an enumeration by name of which is unnecessary for the purposes of this statement. (Transcript, page 14).

The terms of this act of transfer show that this was not a sale or transfer to a stranger or "third party," but that the New Orleans City Railroad Company, under a slightly altered name, became *its own* successor. The company had been incorporated under the general statutes of the State; its charter as a corporation had expired and its stockholders formed the new corporation and transferred and assigned its property rights, etc., to the new company "*for the price and sum of one million four hundred thousand dollars, represented by fourteen thousand shares of the capital stock of the New Orleans City and Lake Railroad Company of the par value of one hundred dollars.*"

The New Orleans City Railroad Company had acquired these privileges or rights of way from the city of New Orleans by a notarial contract of sale dated October 2, 1879, which contract was executed by the mayor of said city, duly authorized thereto by proper ordinances to confirm said rights by formal contract, consequent upon an adjudication previously made in the manner recited in the contract, to said city railroad company for a bonus or cash price of $630,000, for a period of twenty-five years commencing on the 1st of January, 1880. This contract was virtually but a renewal of a similar contract between the city of New Orleans and the City Railroad Company, which expired on the date of the commencement of the latter. Prior to this time the city, wishing to *sell* again these privileges, gave notice to the public in the words and manner following:

"Whereas the franchise granted by the city of New Orleans to the New Orleans City Railroad Company for *running certain lines of railroads* (we ask comparison of this wording with the terms of the law) will expire in 1880; and whereas it is necessary to give ample time to all parties who may desire to make bids or proposals for said franchises at the expira-

tion of the time for which said franchises were granted by the city: Therefore be it

"*Resolved*, That the administrator of commerce be, and is hereby, authorized to advertise until the 1st of July, 1879, in the commercial journal of the city, and also in one of the journals in the cities of New York, Philadelphia, Chicago, and St. Louis, for sealed proposals for a peried of twenty-five years from the respective dates of the expiration of said franchise granted by the city of New Orleans to the New Orleans City Railroad Company, to wit," &c., &c.

Then follows a description of the roads or lines and streets through which same are to be operated.

The ordinance concludes as follows, page 27, to wit:

"That the terms of said *sale* shall be set forth in specifications to be drawn up by the administrator of commerce, with the approval of the council, and to be filed in the office of the administrator of commerce as soon as practical."

Throughout every phrase of this contract it is called a "contract of sale of the franchise for running certain lines of railroad." Among the more important stipulations of it are the following:

The city of New Orleans in this contract and in all similar contracts, and especially in those to which reference is made, which existed between her and the New Orleans City Railroad Company and which expired on the date from which the new franchise is to be granted, had what is called in the contracts "a right of reversion," amounting, however, to nothing more than a right to acquire ownership of the roads and property appurtenant thereto on the payment of a price to be agreed upon according to stipulations contained in said contracts. This right of reversion the city agrees to transfer to any purchaser; apparently an important and essential step in placing in possession any one who shall become purchaser other than the company owning these roads, fixtures, and appurtenances.

The franchise to be sold for cash, the *entire* price to be

paid by the purchaser or purchasers at the time of the delivery of said franchise or franchises.

The delivery to be made by the signing and delivering of an act of transfer and "*by placing the purchaser in actual possession.*"

The purchaser assumes the obligation to keep in repair the streets and bridges through which the lines of road pass from curb to curb.

The specifications provide the rates of fare to be charged.

"The city reserves the right to reject any and all bids, and *sale and adjudication* shall not be considered binding upon the city of New Orleans until the purchaser or purchasers shall have paid, delivered, and deposited the full amount and price of the bid with whomsoever she, by her mayor, [may designate] to receive same for and on behalf of the city."

The contract continues with the recital that accordingly bids were received, and by ordinance 6148 that of the New Orleans City Railroad Company, for $630,000 cash, accepted, and the mayor authorized to sign the necessary contract.

The contract stipulates that the fare shall not exceed five (5) cents for passengers on various lines within certain limits (pages 32 and 33); prescribes the style of cars, &c., reserving the right to the council, however, to make changes; also the motive power; that it shall be horse or mule power; provides the schedule of time, fixing the minimum intervals between cars, &c.

An express stipulation is introduced into the contract that the road and fixtures shall be assessed for taxation to pay the rate of tax levied upon real estate.

The speed of cars shall not exceed six miles per hour.

Out of an abundance of caution it is even stipulated that "*these rights of way are for street railways carrying passengers only.*"

And, finally, to show the absolute nature of this contract,

as a contract of sale of a specified, well-defined *thing* for a fixed price, being the right of running and operating the road for profit, in order to protect the purchaser and at the same time probably to enhance the price which the city expected to realize, it was stipulated (transcript, page 34):

"*The city of New Orleans binds herself not to grant for the period for which the said franchise is sold a right of way to any other railroad company upon the streets through which said right of way is hereby sold, unless by mutual agreement between the city and the purchaser of this franchise.*"

At the conclusion of the contract (transcript, page 29) the mayor declares "*that he, by these presents, in his said capacity, for and on behalf of the city of New Orleans, grants, bargains, sells, conveys, transfers, assigns, and sets over unto the said New Orleans City Railroad Company the rights of way and franchise of the following roads,*" &c. After which follows a description of the various streets, which it is unnecessary to repeat.

In the year 1880, under an act of the legislature of Louisiana, a State and city *license tax* was exacted for or on "the business of carrying on, operating, or running any horse or steam railway, or both, for the transportation of passengers within the limits of any city or town."

In 1886 the license act under which the license in this case is claimed was enacted in the words above stated.

The city of New Orleans enacted verbatim the State law as ordinance No. 2035, under which, directly, the city claims.

This ordinance is, by consent, not in the transcript, the parties having agreed to let the State law, of which it is a reproduction, stand in its stead.

The defendant company is in the full possession and enjoyment of the rights conveyed to it under said contract. It paid "license" under the act of 1880, as it alleges in answer, in error and under misapprehension of its legal rights under the contract referred to.

It does not appear that, excepting the admission made in the answer, any license tax, State or municipal, was exacted or paid prior to 1880 or during the term of the first contract. Asserting its legal rights, the company plaintiff in error in 1887 refused to pay the license demanded, on the ground that it bought from the city of New Orleans for a money price fixed and agreed upon between the parties the right to operate street railways and run cars for the transportation of persons within city limits, viz., the right to do, for the period of twenty-five years, the very thing for which license is sought to be imposed; that the enforcement would impair the obligation of the contract, and it submits the question for adjudication to the courts of justice. Suffice it to say that when the enormous license exacted under the act of 1886 was attempted to be imposed plaintiff in error invoked her rights under the contract, and now submits the question to this court for final adjudication, contending that the payment of this bonus or price of $630,000 for the privilege of running street cars upon certain designated streets excludes in terms and by the most direct implication the idea that it might be in the power of the city of New Orleans to impose in addition thereto a license tax as a condition precedent to the exercise of the right of enjoyment of the thing thus acquired for a valuable consideration.

The manner in which the suit was brought, the pleadings, issues raised on them, &c., are distinctly and fully set forth at pages 1 to 3, inclusive, of the original brief for plaintiff in error. They need not, therefore, be repeated.

Assignment of Error.

I respectfully submit that under the facts stated there is error in the opinion and decree appealed from in this:

1st. That it held that the plaintiff in error is subject to license tax or license of any character as a person pursuing

an ordinary "trade, profession, business, or calling," in the sense of article 206 of the constitution of the State of Louisiana.

2nd. In this, that it held "that the privilege conceded to the plaintiff in error by the city under the contract in question was intended merely to confer the rights to lay rails and do all necessary work on the streets designated," and not the right to carry on the business of operating the road and running street cars for the conveyance of passengers.

3rd. In this, that it held (as a logical necessity from the foregoing) that the city of New Orleans, authorized by an act of the legislature, had the right to impose a license on the business of "running street cars," and that notwithstanding the special contract invoked, the payment of the license so imposed was a condition precedent to operating the street railroad in question and necessary to "vivify the privilege of enjoying the right granted."

4th. In this, that it held that the act of the legislature of Louisiana, being act No. 101 of the session of 1886, and the ordinance of city of New Orleans passed under authority of said act, in so far as they or it purport to impose or are made the legal basis of a demand for a license tax upon plaintiff in error, do not impair the obligation of the city of New Orleans toward the plaintiff in error in violation of section 10, article I, of the Constitution of the United States.

Syllabus to Argument for Plaintiff in Error.

I contend, on the other hand,—

1st. The operating of street railways or "running cars" for transporting passengers within city limits, under the conditions of the contract in question, is not a business or calling open to all, in the sense and meaning of the license

laws of the State of Louisiana. It is but the exercise of the right and the use and enjoyment of the thing purchased for a money price.

2d. It is not in conflict with the principles of strict construction relative to express or implied exemptions from taxation to hold that such a contract in its nature excludes the idea that in addition to the price fixed and paid there shall also be license tax or license for permission. The doctrine of strict construction thus invoked applies only to questions involving a surrender of sovereign power of regulation, control, or recall by future or subsequent legislation.

When the sovereign, or one of the agencies of the sovereign—a municipal corporation—becomes a party to a private contract, the contract is interpreted, as to the rights and obligations created by it, by the general rules of law governing contracts between private persons.

3d. The price being paid for the permission, the doing of the thing stipulated, subsequent laws and ordinances purporting to impose a license tax as a condition precedent to the exercise of the right—the enjoyment of the thing—impair the obligation of the contract in violation of the Constitution of the United States and must, to this extent, be held null and void as to plaintiff in error.

4th. The strict constitutional principles arising under the constitution of Louisiana as to exemption from ordinary taxation do not apply with equal force to a question of exemption from a license tax.

Taxation of all property is obligatory; the legislature has no power or discretion. The imposition of a license tax is optional. "The General Assembly *may* levy a license tax, &c. (Articles 118 and 206, cited in briefs.)

5th. By the city of New Orleans and the courts of the

State of Louisiana, article 206, in so far as it provides that "no political corporation shall impose a greater license tax than is imposed for State purposes," has been construed to the effect that the city can impose no license tax where the State exacts none.

6th. In regard to the subject-matter of the contract granting street railway privileges the municipal corporation acted in her sovereign capacity as an agent of the State, binding the State within the scope of her power, and her contract is as obligatory upon the State as on herself.

7th. The municipal corporation, under her various charters and under the established jurisprudence of the State, has always held and exercised undisputed power in regard to her streets, and particularly the authority and power to grant and sell the right and privilege of running and operating street railways.

8th. A *right* or *thing* thus acquired for valuable consideration under an ordinary contract may be sold, assigned, or transferred by the vendee or grantee.

9th. The necessary reorganization of a corporation on expiration of corporate existence into a new corporation and the formal transmission of the rights and property of the expiring to the *forming* corporation is not a sale or transfer to a third party.

10th. Whether the franchise or rights acquired by the contract in question could be transferred or not, it is not permissible to the city to divide the consequences of the transfer. She cannot be heard to say that she recognizes plaintiff in error as owner of the rights conferred on the original vendee except that of not being bound for license tax to the city.

I respectfully submit the foregoing, praying the kind indulgence and forbearance of the Court for this somewhat broken and disjointed form in which the cause is presented on behalf of plaintiff in error, adding only that the propositions and conclusions as above stated are embraced and covered by the argument submitted in the briefs heretofore filed.

CHARLES F. BUCK,
For Plaintiff in Error.

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CHARLES F. BUCK,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 119.

NEW ORLEANS CITY AND LAKE RAILROAD COMPANY,
APPELLANT,

versus

THE CITY OF NEW ORLEANS, APPELLEE.

On Writ of Error to the Supreme Court of the State of Louisiana.

BRIEF ON BEHALF OF THE CITY OF NEW ORLEANS.

W. B. SOMMERVILLE,
Assistant City Attorney of New Orleans.

OCTOBER 23d, 1891.

T. H. Thomason, Print, 33 Natchez Street.—N. O., La.

In the Supreme Court of the United States,

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On Writ of Error to the Supreme Court of the State of Louisiana.

BRIEF ON BEHALF OF THE CITY OF NEW ORLEANS.

SYLLABUS.

1. A grant, by a municipal corporation, to build and operate street railroads, for a term of years, does not exempt the grantees from the imposition of a license tax for the use of the privilege conferred.

Memphis Gas Light Company vs. Taxing District of Shelby County, 109 U. S. 398.

2. In order to establish a contract to exempt from taxation, the ordinance must be explicit and without doubtful words.

Picard vs. Tennessee, Virginia and Georgia Railroad Company, 130 U. S. 641.

3. If the tax, which, it is claimed, impairs the obligations of a contract, be declared valid, all else in the case is beyond the domain of the jurisdiction of the Court.
The Delaware Railroad Tax, 18 Wall. 231.

4. Exemptions from taxation are personal, and are not transferable.
Morgan vs. Louisiana, 93 U. S. 223.
Chesapeake and Ohio Railway Company vs. Milier. 114 U. S. 176.
Louisville and Nashville Railroad Company vs. Palmer, 109 U. S. 244.
Picard vs. East Tennessee, Virginia and Georgia Railroad Company, 130 U. S. 637.

5. Article 118 of the Constitution of Louisiana, of 1868, which provides that "taxation shall be equal and uniform," requires license taxes to be equal and uniform on all persons pursuing or following the same business, occupation or calling.
Merchants' Mutual Insurance Company vs. Blandin, 24 La. Ann. R. 112.
Parish of East Feliciana vs. Gurth, 26 La. Ann. R. 140.
Honold vs. City of New Orleans, 23 La. Ann. R. 727.
State vs. Endom, 23 La. Ann. R. 664.
City vs. Home Mutual Insurance Company, 23 La. Ann. R. 450.
Parish of Orleans vs. Cochran, 20 La. An. . R. 373.
City of New Orleans vs. Lafayette Insurance Company, 28 La. Ann. R. 757.
City of New Orleans vs. St. Charles Street Railroad Company, 28 La. Ann. R. 498.
Louisiana Cotton Manufacturing Company vs. City of New Orleans, 31 La. Ann. R. 446.
City of New Orleans vs. New Orleans Sugar Shed Company, 35 La. Ann. R. 550.

6. An exemption from taxation, granted by the government to an individual, is a franchise, which can be lost by acquiescence under the imposition of taxes for a period long enough to raise a conclusive presumption of a surrender of the privilege.
Given and others vs. Wright, 117 U. S. 648.

STATEMENT OF FACTS.

The City of New Orleans entered suit against the New Orleans City and Lake Railroad Company to enforce the payment of a license tax, claimed to be due by the latter to the former, for the year 1887.

Among other defenses, the railroad company alleges a contract with the city, whereunder its predecessor had paid a certain price to the city for the privilege of operating street railroads, and that the legislative acts, and city ordinances, imposing the payment of annual license taxes upon it are unconstitutional, null and void, because, they impair the obligations of the contract referred to

The Supreme Court of Louisiana find: that the New Orleans City and Lake Railroad Company is a corporation, doing business in the State of Louisiana, and City of New Orleans; that it is carrying on, operating, and running horse and steam railroads, for the transportation of passengers, within the limits of the city; that the legislative act, and city ordinance, impose a license tax upon all such business; that such act and ordinance are constitutional, legal and valid; that the company owe the tax claimed; and that the act, and ordinance, do not impair the obligations of the contract entered into between the city and the New Orleans City Railroad Company.

The question presented to the Court is: Do the revenue acts, and ordinances, of the State and city, in imposing the payment of license taxes upon the business of carrying on, operating and running railroads, for the trsnsportation of passengers, within the limits of towns and cities, impair the obligations of the contract between the city and the New Orleans City Railroad Company?

ARGUMENT.

The contract entered into between the city and the New Orleans City Railroad Company, the predecessor of plaintiff in error, may be found in Exhibit "B," on page 3, in the appendix attached to this brief.

The New Orleans City Railroad Company was in possession of certain street railroads, but the term of possession was to expire in the early part of the year 1880. when, October 2d, 1879, it again entered into the contract with the city here referred to.

The things authorized by the common council to be sold, were the franchises of certain named street railroads. T. R., p. 26. The things advertised, were the rights of way on the railroads named. T. R., p. 27. The things sold, were the franchises of the New Orleans City Railroad Company to that same company. T R., p. 29. The things delivered, were the property, cars, fixtures and other appurtenances belonging, or in any wise appertaining, to said railroad lines. T. R., p. 35.

Such is the contract. Nowhere, is exemption from taxation conferred, expressly or impliedly. Exemption from taxation is a franchise in itself. Taxation is an attribute of sovereignty. Exemption from taxation must be expressly conferred, or it does not exist. Citation of authorities on this point is an act of supererogation.

Vicksburg, Shreveport and Pacific Railroad Company vs. Dennis, 116 U. S. 665, and authorities cited therein.

U. S. Digest, Vol. II, No. 199, p. 1519.

The only reference made in the contract, to taxes, is found on page 13 of Exhibit "B." It says: "Said purchaser, or "purchasers, shall annually pay into the city treasury, upon "the assessed value of said road and fixtures, the annual tax "levied upon real estate, the value of said road and fixtures "to be assessed by the usual mode of assessment." This is an agreement, as to how the tax on certain of the property

shall be assessed and paid. There is no exclusion from taxation of other property, not mentioned.

Now, the franchise, or right of way, of a railroad, is a different thing from the carrying on of the business of a railroad. The city is the grantor of the first, and the grantee operates the second. The privilege to lay tracks through certain streets, on which to run cars, and to charge for the carrying of passengers, in a municipality, for a term of years, does not, it is submitted, exempt the grantees from the imposition of a license tax, for the use of the privilege conferred.

The contention of the plaintiff in error regarding this proposition was taken up and considered by this Court, and on principle and authority decided, once for all, against plaintiff in error.

In *Memphis Gas Co. vs. Shelby County, 109, U. S. 398.* the Court say, through Mr. Justice Miller:

"The question presented is, whether the statute of the "State under which the defendant assessed a license tax "of $250 against plaintiff in error is void, because it violates "the contract found in the charter of the company.

"This charter was enacted November 20th, 1851, and, "after giving the name of the new corporation, and the "names of the incorporators, it refers for the rights, privi-"leges, powers and restrictions of the company to the "second, third, fourth, fifth, sixth, seven, eighth, ninth, "tenth, eleventh and twelfth sections of an act incorporat-"ing the Nashville Gas Light Company, passed November "21st, 1849, and declares that those sections, not incon-"sistent with the first sections of this act, shall apply to the "Memphis Gas Light Company as fully and completely as "though the same were fully set forth and incorporated. "For any contract of exemption from taxation we must, "therefore, look to the provisions of those sections in the "charter of the Nashville Company.

"These sections contain the usual powers necessary for "the successful conduct of the business of the company, its "organization, its shares of stock, mode of payment, laying "pipes in the streets and the like, and after a careful "examination of them we are unable to see anything what-"ever which expresses a contract for any limitation of the "power of the legislature to tax the company or its prop-"erty * * * *

"The argument of counsel is, that if no express contract "against taxation can be found here, it must be implied, be-"cause, to permit the State to tax this company by a license "tax, for the privilege granted by its charter, is to destroy "that privilege.

"But, the answer is, that the company took their charter "subject to the same right of taxation in the State that "applies to all other privileges, and to all other property. If "they wished or intended to have an exemption of any kind "from taxation, or felt that it was necessary to the profit-"able working of their business, they should have required "a provision to that effect in their charter.

"The Constitution of the United States does not profess "in all cases to protect property from unjust and oppressive "taxation by the State. That is left to the State constitu-"tion, and State law.

"In the case of the *Erie Railroad Co. vs. Pennsylvania*, "*21 Wall, 492*, it was said: 'This court has in the most em-"phatic terms, on every occasion, declared that the language "in which the surrender (of the right of taxation) is made "must be clear and unmistakable. The convenant or enact-"ment must distinctly express that there shall be no other, "or further taxation. A State cannot strip herself of this most "essential power by doubtful words. It cannot, by am-"biguous language, be deprived of this highest attribute of "sovereignty. The principle has been distinctly laid down

" in each of the cases referred to. It has never been de-
" parted from." 101 U.S. 538; 116 U.S. 668; 125 U.S. 37.

The question sought to be raised by plaintiff in error, therefore, is no longer an open one.

If the tax be declared valid, all else in the case is, evidently, beyond the domain of the jurisdiction of the Court.

The reason for this conclusion is, that as soon as it is made to appear that the tax in question is a valid one, impairment thereby of the obligation of the contract involved becomes impossible. The contract must stand, because there is nothing at all to affect it.

Such being necessarily the result where there happens to be an appeal from a Circuit Court, there is additional reason therefor, according to the decisions of this Court, where, as in the case under consideration, the error is to the decision of a State Court.

This Court is then confined to the federal question alone, which may have been raised.

The Delaware Railroad Tax, 18 Wall. 231.

II.

Plaintiff in error resists the collection of the license tax claimed, because it has succeeded, by virtue of a contract of sale of the franchise of its predecessor and vendor, the New Orleans City Railroad Company, to all the rights, privileges and franchises enjoyed by the last named company.

On June 9th, 1883, the New Orleans City Railroad Company did sell to the New Orleans City and Lake Railroad Company the property, right of way and franchises possessed by it. *Exhibit "C."*

Since the time of that sale, the City of New Orleans has recognized plaintiff in error as the successor of the New Orleans City and Lake Railroad Company.

Now, conceding, for the sake of argument only, that the

contract between the City and the New Orleans City Railroad Company contained a clause exempting that company from license taxation, did, or could, that company transfer that right of exemption to plaintiff in error ?

Exemptions from taxation are *strictissimi juris.* They are personal privileges. They are not transferable.

When the New Orleans City Railroad Company sold its rights of way and property to the New Orleans City and Lake Railroad Company, what did it sell ? What transfer has the city acquiesced in ? The contract speaks for itself *Exhibit "B."*

What is a franchise ?

In answering this question, Mr. Justice Field, as the organ of the Court, said: "Much confusion of thought has arisen "from attaching a vague and undefined meaning to the "term 'franchises.' It is often used as synonymous with "rights, privileges and immunities, though of a personal and "temporary character; so that, if anyone of these exists, it "is loosely termed a 'franchise,' and is supposed to pass "upon a transfer of the franchises of the company. But the "term must always be considered in connection with the "corporation or property to which it is alleged to appertain. "The franchises of a railroad corporation are rights or "privileges which are essential to the operations of the cor-"poration, and without which its road and works would be "of little value; such as the franchise to run cars, to take "tolls, to appropriate earth and gravel for the bed of its "road, or water for its engines, and the like. They are "positive rights or privileges, without the possession of "which the road of the company could not be successfully "worked. *Immunity from taxation is not one of them.* The "former may be conveyed to a purchaser of the road as part "of the property of the company; *the latter is personal and* "*incapable of transfer without express statutory direction.*"
Morgan vs. Louisiana, 93 U. S. 223.

The law, as defined in the case referred to, has been followed and adopted in many cases decided by the Court.

In the cases of *Chesapeake and Ohio Railway Company vs. Miller, 114 U. S. 176; Louisville and Nashville Railroad Company vs. Palmes, 109 U. S. 244; and Picard vs. East Tennessee, Virginia and Georgia Railroad Company 130 U. S. 637*, the Court considered the scope and effect of transfers made, where State statutes permitted the transfer of franchises, rights and privileges, possessed by corporations under their charters, and in each case it was held, that the exemption from taxation of the original corporations did not, and could not, pass to the purchasers or successors of those to whom such exemption had been granted.

The reasons given by the Court, why the statutes adopted in advance of the transfers, authorizing corporations to part with their franchises, property, etc., could not have the effect of transferring a right of exemption from taxation, will, it is submitted, apply with equal force to the incidental recognition, by the common council, which may have ratified and approved the sale of the property, franchise, etc., made by the N. O. City R. R. Co. to the N. O. City and L. R. R. Co.

The right of exemption from taxation not being transferable, it could not, under the settled jurisprudence of the country, have been acquired by purchase by plaintiff in error from its vendor, even if the latter had ever possessed such right of exemption.

The claim of exemption, made by plaintiff in error, must, it is submitted, necessarily fail.

III

The general principles and the authority already advanced are, it is submitted, sufficient to require a decision in favor of the defendant in error. Argument on the merits of the question, sought to be raised by the plaintiff in error, is,

notwithstanding, added here, merely for convenience in the way of ready reference.

As we have not, at this time, seen the brief for the other side, no answer can now be made to any argument which may be adduced therein.

In addition to what has been said, it is respectfully urged that the city did not exempt the company from license taxation, or commute the same, because :

1st. The city was prohibited by the State constitution from so doing ;

2nd. The intention of the city to exact, and the company to pay license taxes, are manifested in ways that are not few ;

3rd. Conceding, merely for argument, that an exemption ever was agreed upon, the franchise of exemption in question has been invaded by the company itself, which has actually paid license taxes for a series of seven years. It has consequently forfeited the right of exemption, if any such it ever had.

ON THE CONSTITUTION OF LOUISIANA.

Article 118 of the Constitution of Louisiana, which was in force during October, 1879, when the city and the N. O. City R. R. Co. entered into contract, is as follows : "Taxa-" tion shall be equal and uniform throughout the State. * * * " The General Assembly may levy an income tax upon all " persons pursuing any occupation, trade or calling. And " all such persons shall obtain a license, as provided by " law," etc.

In construing this provision of law, the Supreme Court of Louisiana say : " Art. 118 of the Constitution does not " command that all occupations, trades and callings shall be " taxed ; but that all persons pursuing a profession, trade or " calling, which is taxed, must be taxed equally."

Honold vs. City of New Orleans, 23 Ann. 727.

State vs. Endom, 23 Ann. 664.

" The constitution requires that a license tax, as well as a " tax on property, shall be equal and uniform."

City vs. Home Mutual Ins. Co., 23 Ann. 450.

Parish of Orleans vs. Cochran, 20 Ann. 373.

" The constitution of the State, Art. 118, provides that, " 'the General Assembly may levy an income tax upon all " persons pursuing any trade, occupation or calling, and all " such persons shall obtain a license as provided by law.' It has " been frequently determined that the license tax is simply " an amount levied upon a pursuit, business, trade, occupa- " tion, or calling, and is wholly different in its nature from a " tax on property. To be constitutional, *it must be equal and* " *uniform on all persons pursuing or following the same* " *business, occupation or calling.*"

Merchants' Mutual Ins. Co. vs. Blandin, 24 Ann. 112.

Parish of East Feliciana vs. Gurth, 26 Ann. 140.

" Under the constitution of 1868, the General Assembly " cannot commute taxes, because Article 118 prohibits the " General Assembly from exempting property from taxa- " tion, except such as is actually used for church, school or " charitable purposes, and declares 'taxation shall be equal " and uniform throughout the State,' and 'all property shall " be taxed in proportion to its value.' This article restricts " the exercise of the taxing power. Taxation must be equal " and uniform and *ad valorem* upon all property throughout " the State, if levied for State purposes, or throughout the " city, if levied for city purposes. This requirement of the " constitution is mandatory, and it precludes the exercise of " the taxing power, except in the manner indicated. And " this limitation upon the power of taxation given to the " General Assembly precludes the idea of the existence of " power to commute taxes. If the General Assembly can " commute the taxes of one person, they may of another "

City of New Orleans vs. Lafayette Insurance Company, 28 Ann. 757.

"Defendant acquired the contract from Nicholson & Co., "who contracted for the privilege of running street cars "with the Mayor of New Orleans, under an ordinance "adopted on the eleventh of November, 1865, 'for the sale "of the right of way to establish a railroad on St. Charles "and other streets in the City of New Orleans.'

"This ordinance provides for the sale of the right of way "for a period of twenty years, and 'on the expiration of the "lease, the road, rolling stock, equipments, depots and "fixtures to be taken by the city at an appraised valua-"tion.' * * *

"'That the said Nicholson & Co. shall pay nine-sixteenths "of one per cent for each passenger carried, as a bonus for "the privilege given'.* * *

"Also, 'that for and in consideration of the bonus afore-"said, the contractors shall be exempt from all taxation "upon the value of the track, rolling stock, equipments and "depots.'

"The theory of the defense is that the bonus stipulated "in the ordinance and contract is a substitute for city taxes, "or a commutation of taxes.

"To this the answer is, the municipal corporation can "only exercise powers delegated to it by the State; and in "the case at bar the power to commute taxes was not given "to the City of New Orleans, and all parties dealing with "the city are charged with notice of the extent of the "powers it possesses. So far from granting power to com-"mute taxes, the charter of 1856, in force when the ordi-"nance in question was adopted, declares that 'all real and "personal property within the City of New Orleans, "whether owned by individuals or corporations, shall, for "the purpose of this act, be liable to taxation.'* * * Also, "that the city shall levy annually 'an equal and uniform tax "upon all property real and personal in said city.' No act "or contract of the City of New Orleans could defeat the

"expression of legislative will contained in the clauses of "the charter quoted."

City of New Orleans vs. St. Charles Street Railroad Company, 28 Ann. 498.

Louisiana Cotton Manufacturing Co. vs. City of New Orleans, 31 Ann. 446.

City of New Orleans vs. the N. O. Sugar Shed Co., 35 Ann. 550.

The Supreme Court of Louisiana hold, that the New Orleans City and Lake Railroad Company is doing business in the City of New Orleans, in the sense of the constitution, and the license act, of that State. This construction of a State statute by the Supreme Court of Louisiana, involving no question under the law or Constitution of the United States, is, under repeated and familiar decisions of this Court, conclusive upon the Court. Such construction, by the highest State tribunal, will be accepted and adopted by the Supreme Court of the United States.

Erie Railway Co vs. Pennsylvania, 21 Wall 497.

The Delaware Railroad Tax, 18 Wall 231.

It has been shown that all persons pursuing the same business should be taxed for licenses equally and uniformly. To have attempted to license the New Orleans City Railroad Company by special contract, would have been evidently unconstitutional, null and void, when the business of operating railroads was licensed in the general revenue law.

As to the Intention of the Parties.

It was not the intention of the city to accept the selling price of the franchise of the railroad in payment of the annual license taxes for twenty-five years.

It has been held, and the doctrine has been so often repeated that it is no longer an open question, that the legislature of a State may exempt the property of particular persons, or corporations, from taxation, either for a limited time, or perpetu-

ally; provided the constitution of the State does not prohibit exemption from, or commutation of, taxes; but to justify the conclusion that such exemption is granted, it must appear by language so clear and unmistakable as to leave no doubt of the purpose of the legislature. *Picard vs. Tennessee, Virginia and Georgia Railroad Company, 130 U. S. 641.*

The ordinances and contracts of the common council of a municipality are construed by the same rules of construction as are the laws and contracts of State legislatures.

If there be any doubt, in the language of the contract under consideration, as to the intention of the city to impose and collect license taxes from plaintiff in error, certainly the intention of the city, at this time at least, is made manifest by the present suit for the collection of the tax.

The intention, and the general understanding too, of the company is well shown by the allegation in its answer to the rule filed in this suit, to the effect that it had paid all city licenses up to and including the year 1886. T. R. p. 5.

The New Orleans City Railroad Company, to which plaintiff in error is successor, clearly understood the matters in the same way as did the City. It paid its licenses, and transferred, at the time of the sale, the license of that year, which license was accepted by plaintiff in error. See act of sale by the former company to the latter company. *Exhibit* "*C*," *p. 31.* The declaration is in these words: "And said New Orleans City Railroad Company, "having, *according to law*, paid its State and city licenses "for 1883, amounting to twenty-five hundred dollars each, "hereby transfers the unexpired term thereof, extending to "December 31st, 1883, to the present purchaser, the New "Orleans City and Lake Railroad Company."

Of course the City Railroad Company could not transfer to plaintiff in error more than it received. In the sale from the city to that company, Mr. Wintz, as president, acknowledged "due delivery of all the property, cars,

" fixtures and other appurtenances belonging or in any wise " appertaining to said railroad lines." *Exhibt* " *B*," *p. 15.*

Now, exemption from taxation is certainly not an *appurtenance* to a street railroad ; and where no exemption was delivered to, or received by, the New Orleans City Railroad Company, they and their successors cannot justly lay claim to any.

It may not be amiss, in determining the intention of the parties to the contract under consideration, to examine another record, on file in this Court, between the same parties. The evidence here mentioned will have to be passed upon by the Court at a later time, and reference to it now may go towards insuring accuracy.

On July 1st, 1878, the City of New Orleans and the New Orleans City Railroad Company entered into an agreement, whereby the latter advanced a certain amount of money for designated improvements. This amount was to be repaid in two installments, in one and two years, by the issuance of license and tax receipts by the city to the company. See *Exhibit* " *D*." *p. 32.* This agreement is found in the transcript of record of *New Orleans City and Lake Railroad Company vs. State of Louisiana ex rel. The City of New Orleans, No. 1314 of the October term of 1890*, at page 216.

The agreement above referred to was sold by the New Orleans City Railroad Company to plaintiff in error, together with all other property, and it is specifically referred to in the act of sale between them. *Exhibit* " *C*," *p. 26.* This agreement was entered into in 1878, prior to the date of the contract under discussion, and reference to it is ventured inasmuch as the same subject matter is concerned in both causes ; this being the identical contract, and between the same parties now before the Court.

THE PAYMENT OF LICENSE TAXES.

It is very clear that the payment of license taxes for a term of years, not only serves as a means of determining the intention of the parties to the contract, who happen to pay by an acknowledgment of the indebtedness discharged, but that it also imports absolute surrender of the privilege of exemption.

Says Mr. Justice Bradley, as the organ of the Court:

"An exemption from taxation by the government to an "individual is a franchise, which can be lost by acquiescence "under the imposition of taxes for a period long enough to "raise a conclusive presumption of a surrender of the privi- "lege, and such acquiescence for a period of sixty years, "(and, indeed, for a much shorter period), raises such a "presumption."

Given vs. Wright, 117 U. S. 648.

The plaintiff in error has submitted uncomplainingly, "and in accordance with law," as said in the contract of sale from its predecessor, to the imposition of license taxes for one-fourth the term of its existence. It is too late to be heard to complain now.

In consideration of the foregoing argument, the judgment of the Supreme Court of Louisiana ought to be affirmed.

Respectfully submitted,

W. B. SOMMERVILLE,

Assistant City Attorney of New Orleans.

October 23rd, 1891.

APPENDIX.

EXHIBITS

REFERRED TO IN THE FOREGOING BRIEF.

APPENDIX.

EXHIBIT "A."

ACT No. 101 OF GENERAL ASSEMBLY OF THE STATE OF LOUISIANA FOR THE YEAR 1886.

That for the business of carrying on, operating, or running any horse or steam railroad, or both, for the transportation of passengers within the limits of any city or town in this State, the annual license shall be based on the annual gross receipts, as follows, viz:

First class—When the said annual gross receipts are five hundred thousand dollars, or in excess of that amount, the license shall be twenty-five hundred dollars, $2500.

Second class—When the said annual gross receipts are over four hundred and fifty thousand dollars, and not more than five hundred thousand dollars, the license shall be twenty-two hundred and fifty dollars, $2250.

Third class—When the said annual gross receipts are over four hundred thousand dollars, and not more than four hundred and fifty thousand dollars, the license shall be two thousand dollars, $2000.

Fourth class—When the said annual gross receipts are over three hundred and fifty thousand dollars, and not more than four hundred thousand dollars, the license shall be seventeen hundred and fifty dollars, $1750.

Fifth class—When the said annual gross receipts are over three hundred thousand dollars, and not more than three hundred and fifty thousand dollars, the license shall be fifteen hundred dollars, $1500.

Sixth class—When the said annual gross receipts are over two hundred thousand dollars, and not more than three hundred thousand dollars, the license shall be one thousand dollars. $1000.

Seventh class—When the said annual gross receipts are over

one hundred thousand dollars, and not more than two hundred thousand dollars, the license shall be five hundred dollars, $500.

Eighth class—When the said annual gross receipts are one hundred thousand dollars or less, the license shall be two hundred and fifty dollars, $250; *provided*, That in cities where the population is less than fifty thousand, there shall be two grades based on actual gross receipts as follows, viz:

First class—When the annual gross receipts are twenty-five thousand dollars, or in excess of that amount, the license shall be one hundred dollars, $100.

Second class—When the annual gross receipts are less than twenty-five thousand dollars, the license shall be fifty dollars, $50.

Sec. 8, page 175, of the Acts of the General Assembly of Louisiana for the year 1886.

EXHIBIT "B"

Sale of the Right of Way and Franchises by the City of New Orleans to the New Orleans City Railroad Company.

UNITED STATES OF AMERICA.

STATE OF LOUISIANA,

Parish of Orleans, City of New Orleans.

Be it known that on this second day of the month of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the 104th—before me, Gustave Le Gardeur, Jr., a notary public, duly commissioned and sworn, in and for the parish and city aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned—personally came and appeared the Honorable Isaac W. Patton, mayor of the city of New Orleans, herein duly authorized in the full execution of these presents, under and by virtue of Resolution 6148, Administration Series, adopted by the council of the city of New Orleans on this 2d day of October, 1879, a certified copy whereof is hereto annexed for reference.

And also came and appeared Frederick Wintz, of this city, president of the New Orleans City Railroad Company, and duly authorized as such in the full execution of these presents, under and by virtue of the resolution adopted by the board of directors of the said company at their sitting of the 1st and 22d days of September, 1879, a certified copy whereof is hereto annexed for reference.

And the said Mayor Patton, in his said capacity, declared that on the 25th day of March, 1879, the council of the city of New Orleans adopted the following resolution, to-wit:

No. 4968, Administration Series.

"Whereas, the franchises granted by the city of New Orleans to the New Orleans City Railroad Company for running certain lines of railroad will expire in 1880; and

"Whereas, it is necessary to give ample time to all parties who may desire to make bids or proposals for said franchises at the

expiration of the time for which said franchises were granted by the city: Therefore be it

"Resolved, That the administrator of commerce be, and is hereby, authorized to advertise until the first day of July, 1879, in the official journal of the city, and also in one journal in the cities of New York, Philadelphia, Boston, Chicago, and St. Louis, for sealed proposals for the franchises of the following-mentioned roads for a period of twenty-five years from the respective dates of the expiration of said franchises granted by the city of New Orleans to the New Orleans City Railroad Company, to-wit: 1. The Magazine, Camp, Prytania, Rampart, and Dauphine lines, which expire on the 3d day of February, 1880. 2. The Canal street and Metairie Road Line, which expires on the 2d day of July, 1880; 3d. The Esplanade Street Line, which expires on the 2d day of July, 1880.

"That the terms of said sale shall be set forth in specifications, to be drawn up by the administrator of commerce, with the approval of the council, and to be put on file in the office of the administrator of commerce as soon as practicable."

That on the 22d day of April, 1879, the council of the city of New Orleans adopted the following resolution, to wit:

No. 5020, Administration Series.

"Resolved, That ordinance No. 4969, Administration Series, be amended to read as follows:

"That the administrator of commerce be, and is hereby, authorized to advertise until the first day of September, 1879, in the official journal of this city, and also in one journal in the cities of New York, Philadelphia, Boston, Chicago, and St. Louis, for sealed proposals for the sale of the franchises of the railroad lines named therein from the respective dates of the expiration of said franchises granted by the city of New Orleans up to the first day of January, 1906."

That in accordance with the provisions of said resolution No. 4968, administration series, the Honorable J. Henry Behan, administrator of commerce of the city of New Orleans, has published or caused to be published the following advertisement, to wit:

Sale of the franchises of the New Orleans City Railroad Company.

DEPARTMENT OF COMMERCE, ROOM NO. 13, CITY HALL,
NEW ORLEANS, *May 19th, 1879.*

"Sealed proposals will be received at the office of the administrator of commerce, room No. 13, city hall, New Orleans, until 12 m. on the first day of September, 1879, for the right of way on the following railroads, to-wit:

"SECTION 1. Camp and Prytania and Camp and Magazine Street Lines, which expire on the third day of February, 1880.

"SECTION 2. Rampart and Dauphine, Canal Street and Metairie Ridge to Bayou St. John, and Esplanade and Bayou Bridge Lines, which expire on the second day of July, 1880.

"The right of way to the purchasers of said franchises shall expire on the first day of January, 1906, and at the expiration of said time the said railroad cars, fixtures, and their appurtenances shall revert to the city on a valuation to be ascertained by two disinterested persons, one to be appointed by the purchaser or purchasers and the other by the city, and, in the event of a disagreement as to said valuation between said persons thus appointed, a third party or umpire shall be appointed by one of the district courts on the joint application of the parties; the decision thereby had to be final.

"That the city shall bind herself to transfer to the purchasers of each line of road, as per sections 1 and 2, the right of reversion, which the city now has, to purchase all the property of each line at an appraised value.

"That said franchises shall be sold for cash, the entire price to be paid by the purchaser or purchasers of the franchise or franchises at the time of the delivery of the said franchise or franchises.

"The delivery is made by the signing and delivery of the act of transfer and by placing the purchaser in actual possession.

"That the purchasers of said franchises shall keep in repair the streets and bridges through which the lines of road pass from curb to curb, under the directions of the administrator of improvements and the city surveyor.

"That the fares to be charged by said purchasers on their roads shall never exceed the amounts now charged, except as provided in the specifications herein referred to.

"Each bid shall be accompanied by a deposit or certified check of $50,000 as an evidence of their intention to abide by the adjudication, which amount shall be forfeited in case of failure to sign the contract; and the same shall be held as a special deposit until the final delivery of said road and appurtenances.

"Bidders to whom the contract is not awarded shall have their deposits returned to them on the day adjudication is made. Bidders can bid for either franchise, say, for sections one and two, or both, at their option.

"Pamphlets containing specifications of contract can be obtained on application to the administrator of commerce.

"Proposals must be endorsed 'Bids for the franchises of the New Orleans City Railroad.'

"The city reserves the right to reject any and all bids, and the sale and adjudication shall not be considered as perfected and binding upon the city of New Orleans until the purchaser or purchasers shall have delivered, paid, and deposited the full amount of the price of the bid with whomsoever may be designated by the mayor to receive the same for and on behalf of the city; and until such deposit and payment of the price shall have been made and accepted by the council the adjudication shall not bind the city nor operate as an engagement or contract.

"(Signed) J. HENRY BEHAN,

"*Administrator of Commerce.*"

That in accordance with the foregoing advertisement sealed proposals for the franchises of the New Orleans City railroad were received up to 12 m. on Monday, the first day of September, 1879, at the office of the said administrator of commerce.

That on the same day, to-wit., on the first day of September, 1879, the mayor and administrator met in committee of the whole in the mayor's parlor; that there and then the said sealed proposals were opened, and the proposal of the said New Orleans City Railroad Company for the sum of six hundred and thirty thousand dollars ($630,000) was found to be the highest.

That at the session of the city council on this Thursday, the

second day of October, 1879, the bid or the proposal of the said New Orleans City Railroad Company for six hundred and thirty thousand dollars for the franchises of the New Orleans City railroad was accepted by the city council, and the mayor instructed to enter into and sign the necessary contract with the said New Orleans City Railroad Company, as fully appears by the said resolution, No. 6148, administration series, adopted by the council of the city of New Orleans on this second day of October, 1879, a certified copy whereof is hereto annexed for reference as aforesaid.

Now, therefore, the said mayor, Isaac W. Patton, declared that, in consideration of the foregoing and by virtue of the power in him vested by the said resolution, No. 6148, administration series, he does by these presents in his said capacity and for and on behalf of the city of New Orleans grant, bargain, sell, convey, transfer, assign, and set over unto the said New Orleans City Railroad Company, the said Frederick Wintz, as president aforesaid, accepting and purchasing for and in the name of the said New Orleans City Railroad Company and acknowledging due delivery and possession of all the property, cars, fixtures, and other appurtenances thereunto belonging or in anywise appertaining—

The right of way and franchises of the following railroads, to-wit:

Section 1. Camp and Prytania and Camp and Magazine Streets lines, for the full term and period commencing on and to be computed from the third day of February, 1880, and to end on the first day of January, 1906.

Sec. 2. Rampart and Dauphine, Canal street and Metairie Ridge to Bayou St. John, and Esplanade and Bayou Bridge lines, for the full term and period commencing on and to be computed from the second day of July, 1880, and to end on the first day of January, 1906:

To have and to hold the said right of way and franchises of the said railroad lines and the right of reversion of the city to purchase all the property of each line unto the said New Orleans City Railroad Company, its successors and assigns, transferees

and vendees, for the full term and period hereinabove fixed and determined by these presents.

This sale is made and accepted in accordance with the specifications on file in the office of the administrator of commerce, which said specifications are in the words and figures following, to-wit:

Specifications concerning the sale of the right of way and franchises for a term of years expiring on the first day of January, 1906, as per ordinances Nos. 4968 and 5030, administration series, hereunto annexed, of the following street railroads of the New Orleans City Railroad Company, to-wit:

"Camp and Prytania, Camp and Magazine, Rampart and Dauphine, Canal street and Metairie Road to Bayou St. John, and Esplanade and Bayou Bridge lines."

"Section first.

"Camp and Prytania Streets line, Camp and Magazine Streets line.

"Section second.

"Rampart and Dauphine, Canal Street and Metairie Road to Bayou St. John, Esplanade and Bayou Bridge. The Camp and Prytania, Camp and Magazine, and Rampart and Dauphine Streets lines expire on the third day of February, 1880. (See ordinance No. 4945, attached.)

"The Canal Street and Metairie Road and the Esplanade and Bayou Bridge lines expire on the second day of July, 1880. (See ordinance No. 5244, attached.)

"The above-mentioned roads run on the following streets:

"First section.

"Comprises the following roads passing through the streets hereinafter named, with tracks, turnouts, and turn-tables, viz:

"The Camp and Prytania and Camp and Magazine lines.

"Three tracks on Canal street from St. Charles to Camp street; single track on Canal street from Magazine to Camp street; single track on Magazine from Canal street to St. Andrew street; double track on Magazine from St. Andrew to Toledano street; double track on Prytania from Poeyfarre to Toledano street; single track on Camp street from Poeyfarre to Canal street; single

track on Poeyfarre street from Magazine to Camp street; single track on Toledano street from Camp to Prytania street.

"Second section.

"Comprises the following roads passing through the streets hereinafter named, with the tracks, turnouts, and turn-tables:

"Rampart and Dauphine Streets lines.

"Double track on Rampart street from Canal street to Esplanade street; a single track on Dauphine street from Esplanade to Poland street; a single track on Rampart street from Esplanade to Poland street; a double track on Poland street from Dauphine to Rampart street; a double track on Dauphine street from Poland street to Caffin's lane; a single track on Dauphine street from Caffin's lane to Delery street, with the right of a double track.

"Canal street and Metairie road to Bayou St. John.

"A double track on Canal street from Carondelet street to Metairie road, along Metairie road to new canal; four tracks on Canal street from St. Charles to Carondelet street; double track on Metairie ridge from new canal to Carondelet canal or Bayou St. John.

"Esplanade and Bayou Bridge lines.

"Double track on Esplanade street from Rampart street to Bayou St. John; double track on Esplanade street from Levee to Rampart street. (See ordinance No. 2518, attached.) All these rights revert to the city at the expiration of the twenty years, to-wit.. the third day of February and the second day of July, 1880."

" 'Ordinance No. 4945, old series.

" 'Resolved, That the adjudication made by the controller on the twentieth day of January, 1860, of the right of way to establish railroads in the city of New Orleans, under and by virtue of resolutions Nos. 4364, 4474, 4735, and 4766, to J. B. Slawson—securities, Henry Hart, F. Wintz, and P. Irwin—for and in consideration of $130,000 bonus offered by him, be, and the same is hereby, approved, the securities accepted, and the mayor authorized to sign the necessary act or acts with the said parties.'

" 'Ordinance No. 5244, old series.

" 'Resolved, That the following adjudications made by the con-

troller on the second of June, 1860, be, and the same are hereby, approved, and the securities accepted, viz:

" 'First. Under resolution No. 5122, the right of way for a railroad on Canal street from Rampart street to the Metairie ridge, to J. B. Slawson & Co.; security, Henry Hart, P. Irwin, and Frederick Wintz, for $500 bonus.

" 'Second. Under resolution No. 5119, the right of way for railroad on Esplanade street from Rampart street to Bayou St. John, to J. B. Slawson & Co.; security, Henry Hart, Patrick Irwin, and Frederick Wintz, for $500 bonus.

" 'Resolved further, That the mayor be, and he is hereby, authorized to sign the necessary act or acts with the said parties for the performance of the work.'

" 'Ordinance No. 2518. administration series.

" 'An ordinance granting to the City Railroad Company the right of way for a railroad on Esplanade street to connect the Esplanade and Bayou line of the New Orleans City Railroad Company with the Levee line, and other purposes.

" 'Be it ordained by the city council, That for and in consideration of the sum of one thousand dollars in United States currency, to be immediately paid into the city treasury, there be, and is hereby, granted to the New Orleans City Railroad Company the right of way and privilege of constructing and laying a double-track railroad on Esplanade street, to extend from the junction of Rampart to Peters or Levee street for the purpose of connecting the Esplanade and Bayou line with the Levee line of said company; the tracks, cars, equipments, management, and regulations to conform to and be identical with the roads to be connected. Said grant of right of way shall continue during the continuance of the charter of the New Orleans City Railroad Company and shall terminate therewith. The track shall be laid in accordance with the specifications to be furnished by the city surveyor.'

" 'The purchaser or purchasers shall be bound to keep the paved or unpaved streets through which said tracks pass, as well as all the bridges on said streets, in good repair and condition from curb to curb during the continuance of their privilege and right of way.

" 'They shall, on proper notification from the administrator of improvements and the city surveyor, raise, repair, and repave any or all intersections of streets when required, upon lines and levels to be furnished by the city surveyor.

" 'They shall be required to widen and deepen any or all culverts and sluices to such dimensions as may be required and directed by the city surveyor. They shall be required to keep all bridges in repair and make new ones when required by the administrator of improvements and the city surveyor on all the streets through which their lines pass.

" 'The lines of said tracks within the rails shall be paved with round stone, except where square stone pavements exist or may hereafter be made, in which case the same material shall be used for paving within rails. When the paving of the streets, where the same are paved, as well as the shelling of the streets where the same are shelled, shall be taken up for the purpose of repair, they shall be replaced in the same condition as formerly, and the streets graded to a proper grade to be furnished by the city surveyor. Wherever the streets are not yet paved the lines of the tracks, within the rails, shall be paved with either round stones or with four by five inch scantling in the best workmanlike manner, and the space between the lines of track and the gutters of the streets shall be flanked with yellow pine planks three inches thick, laid on stringers of four inches thick by eight inches wide; the timber used to be of the best quality and to the entire satisfaction of the administrator of improvements and city surveyor. The rails shall be of the same pattern as those now in use. The cross-ties shall be of yellow pine, six by eight inches and eight feet long, the string pieces of yellow pine five by eight inches, all of the best quality of lumber and to the entire satisfaction of the administrator of improvements and city surveyor.'

" Should the purchaser or purchasers at any time refuse to comply with any or all the requirements of these specifications or fail to comply with the notifications of the administrator of improvements and the city surveyor or refuse or neglect to keep the streets and bridges in good order and condition, he or they or their authorized representatives shall be subject to a fine of $25 or thirty days' imprisonment for each and every offense, at

the discretion of the court; said fine to be recoverable before the recorder of the municipal district in which the offense was committed.

"The fare on the Camp and Magazine line between Canal and Toledano streets or for any lesser distance between those points shall not exceed five cents for passenger either way, except as is hereinafter provided.

"The fare on the Camp and Prytania line between Canal and Toledano streets shall not exeeed five cents per passenger either way, except as hereinafter provided.

"The fare on the Rampart and Dauphine line between Canal street and the United States barracks shall not exceed five cents per passenger either way, except as hereinafter provided.

"The fare on the Canal Street and Metairie Road line from neutral ground on Canal street, between Carondelet and St. Charles, to Metairie ridge or cemeteries shall not exceed five cents per passenger either way, except as is hereinafter provided.

"The fare on the Esplanade and Bayou Bridge line from Canal street to Bayou bridge shall not exceed five cents per passenger either way, except as hereinafter provided.

"They shall further be allowed to charge five cents from the new canal to Bayou St. John, on the Ridge line.

"The style of cars used to be the same as those now in use, unless some improved and advantageous pattern is introduced during the existence of this contract, when, upon application to and approval by the council, the same may be changed.

"The cars shall be drawn by horse or mule power, and if more than one horse or mule be used for each car, they shall be driven abreast.

"Said cars shall be run as often during the day or night as the purchasers may deem proper, but not at greater intervals than every ten minutes from daylight to 10 o'clock p. m., and every fifteen minutes from 10 o'clock until 12.30 o'clock a. m., and every hour thereafter until daylight on the Camp and Magazine, the Camp and Prytania, the Rampart and Dauphine to Poland street, the Esplanade and Bayou Bridge, and the Canal and Ridge line to Broad street station. For each and every fare after 12.30 o'clock they shall be allowed to charge twenty-five cents.

"Said purchaser or purchasers shall annually pay into the city treasury, upon the assessed value of said road and fixtures, the annual tax levied upon real estate; the value of said road and fixtures to be assessed by the usual mode of assessment. The speed of said cars shall not exceed six miles per hour. All cars that may be run on said railroads between sunset and daybreak shall be provided with a good and ample head-light placed in a conspicuous position in and on said cars, and for the violation of this or any other ordinance now existing or that may hereafter be enacted in accordance with the provisions of these specifications on the part of any officer or employee of said roads, the purchaser or purchasers shall be liable to all fines and damages arising therefrom.

"The city binds herself to transfer to the purchaser or purchasers of the franchises of the New Orleans City railroad, as herein set forth, the right of reversion which the city now has to purchase all the property, cars, fixtures, and other appurtenances of each line at an appraised value, in accordance with the following section of their present contract, to wit:

"'The said railroads, cars, fixtures, and other appurtenances shall revert to the city at the expiration of the said twenty years' privilege on a valuation to be ascertained by two disinterested persons, one to be appointed by the purchaser or purchasers and the other by the city; and in the event of a disagreement as to said valuation between said persons a third party or umpire shall be appointed by one of the district courts, the decision thereby had to be final.'

"The rights of way are for street railroads carrying passengers only.

"It is understood that the purchaser or purchasers are allowed to make such turn-outs and crossings as may be necessary, on the streets through which they have the right of way, on lines and levels to be furnished by the city surveyor.

"The city of New Orleans binds herself not to grant, during the period for which said franchises are sold, a right of way to any other railroad company upon the streets through which said right of way is hereby sold, unless by mutual agreement

between the city and the purchaser or purchasers of these franchises.

"The purchaser or purchasers are not to change any of the tracks from the lines and levels now existing without the consent of the city council.

"The city reserves the right to limit the running of steam-trains on Canal street to any part where the council may deem it expedient and necessary in the interests of the property-holders or the community at large.

"The city reserves the right to reject any and all bids, and the sale and adjudication shall not be considered as perfected and binding upon the city of New Orleans until the purchaser or purchasers shall have delivered, paid, and deposited the full amount of the price of the bid with whomsoever may be designated by the mayor to receive the same for and on behalf of the city; and until such deposit and payment of the price shall have been made and accepted by the council the adjudication shall not bind the city nor operate as an engagement or contract.

"(Signed) J. HENRY BEHAN,
"*Administrator of Commerce.*"

And now the said Frederick Wintz, as president aforesaid, declared that he does, by these presents, in his said capacity, bind and obligate the said New Orleans City Railroad Company, its successors, assigns, transferees, and vendees, at all times, to abide by, comply with, conform to, and observe all and singular the terms, conditions, clauses, stipulations, regulations, and penalties of the said specifications, and to enjoy and exercise the herein-conveyed right of way strictly in accordance with the said specifications.

This sale, in conformity with the proposal made by the said New Orleans City Railroad Company and accepted by the city of New Orleans, is made and accepted, for and in consideration of the price and sum of six hundred and thirty thousand dollars, for the full term and period hereinabove fixed and determined, payable cash.

Now, therefore, in conformity with the terms of the present sale, and it being the true intent of the city to make delivery hereby, and the said New Orleans City Railroad Company being

in full possession and acknowledging, *as* the said Frederick Wintz, as president aforesaid, does hereby acknowledge, for and in the name of the said New Orleans City Railroad Company, due delivery of all the property, cars, fixtures, and other appurtenances belonging or in anywise appertaining to said railroad lines, the said Frederick Wintz, as president of the said New Orleans City Railroad Company, has paid cash the said sum of six hundred and thirty thousand dollars ($630,000) into the department of finance of the city of New Orleans, as appears by the receipt of the administrator of finance, hereto annexed for reference.

And the said mayor, Isaac W. Patton, declared that by virtue of the authority in him vested by the said resolution No. 6148, administration series, he does, by these presents, in his said capacity, and for and in the name and on behalf of the city of New Orleans, acknowledge that the payment of the said purchase price has been duly made by the said New Orleans City Railroad Company; that he does hereby accept the payment of the said purchase price and give full and ample acquittance and discharge for the same.

Thus done and passed in New Orleans, at my office, the day, month, and year first above written, in the presence of Minor Martin Elmore and William H. Hyatt, competent witnesses, who have signed with the said parties and me, notary, after reading the whole.

(Original signed)

I. W. PATTON,
Mayor City of New Orleans.
F. WINTZ,
President N. O. City R. R. Co
MINOR M. ELMORE,
WILLIAM H. HYATT,
G. LE GARDEUR, JR,
Notary Public.

A true copy of the original on file and on record in my office. New Orleans, Oct. 3d, 1879.

G. LEGARDEUR, JR.,
Notary Public.

EXHIBIT "C."

Sale and Transfer from New Orleans City Railroad Co. and New Orleans City and Lake Railroad Co.

STATE OF LOUISIANA, *Parish of Orleans:*

Be it known that on this ninth day of June, in the year one thousand eight hundred and eighty-three, before me, William Octave Hart, a notary public in and for this parish and State, duly commissioned and sworn, personally came and appeared Messrs. Albert Baldwin, Charles E. Black, and Hypolite Gally, all of this city, and herein appearing and acting as the liquidating commissioners of the New Orleans City Railroad Company, late a corporation of this city and State, organized by act before Edward Barnett, late a notary public in this city, on June 15th, 1860, said commissioners being appointed at a general meeting of the stockholders of said company, held May 15th and 16th, 1883, as will more fully appear by reference to a duly certified copy of the resolution adopted at said meeting, made part hereof and hereto annexed.

And the said appearers severally declared that, by virtue of the power vested in them by said resolution, they do hereby grant, bargain, sell, assign, transfer, convey, abandon, set over, and deliver, with all legal warrantees and with substitution and subrogation to all rights and actions of warranty against former owners and possessors, unto "The New Orleans City and Lake Railroad Company," a legal corporation of this city and State, organized by act before the undersigned notary, May 17th, 1883, and herein represented by Brownlee W. Taylor, Isaac L. Lyons, and Richard M. O'Brien, the committee named in article nine of its charter, as well as by its president, Joseph A. Walker, and its secretary, William E. Leverich, all here present, accepting, and purchasing for said company, its successors and assigns, and acknowledging due delivery and possession thereof, all and singular the property of said late New Orleans City Railroad Company, real and personal, movable and immovable, as hereinafter described.

Real estate.

1st. A certain square of ground, together with all the improve-

ments thereon, rights, ways, privileges, and appurtenances thereto belonging or in anywise appertaining, situated in the second district of this city, and comprised within Canal, Custom-House, Dupre, and White streets, and designated by the number thirty on a plan drawn by L. Surgi, surveyor, dated 31st of December, 1849, and deposited in the office of O. H. Perry, late a notary in this city. Said square measures two hundred and eighty-three feet four inches seven lines on Canal street, a like measurement on Customhouse street, three hundred and thirteen feet four inches on Dupre street, and a like measurement on White street; which said property was purchased by the said New Orleans City Railroad Company by act passed before Theodore O. Stark, late notary in this city, July 20th, 1860, from W. A. Bell.

2d. Eight lots of ground, adjoining each other, situated in the second district of this city, and designated by the numbers five, six, seven, eight, nine, ten, eleven, and twelve, in a portion of ground which is bounded on two sides by the old shell road of Bayou St. John and on a third side by Esplanade street, four of which lots—the numbers six, seven, ten, and eleven—are fronting on Esplanade street, and the four others—numbers five, eight, nine, and twelve—are fronting on said old shell road, which four first lots adjoin the four others in the rear; and the said eight lots, agreeably to a plan drawn by C. A. de Armas, dated 18th May, 1859, and deposited in the office of Jos. Cuvillier, notary, have the following dimensions, in American measure, to-wit: Lot number five measures thirty-two feet one inch and four lines front on the old shell road of Bayou St. John, two hundred and twenty-seven feet ten inches and five lines in depth on the line dividing it from lot number four, two hundred and twenty-eight feet seven inches and one line on the line dividing it from lot number eight, and thirty-two feet five inches and a half line on the rear line.

Lot number eight measures thirty-two feet one inch and four lines front on the old shell road of Bayou St. John, two hundred and twenty-eight feet seven inches and one line on the line dividing it from lot number five, two hundred and twenty-nine feet three inches and five lines on the line dividing it from lot

number nine, and thirty-two feet five inches and one-half line on the rear line.

Lot number nine measures thirty-two feet one inch and four lines front on said old shell road, two hundred and twenty-nine feet three inches and five lines on the line dividing it from lot number eight, two hundred and thirty feet one line on the line dividing it from lot number twelve, and thirty-two feet five inches and one-half line on the rear line.

Lot number twelve measures thirty-two feet one inch and five lines front on the line dividing it from lot number nine, and two hundred and thirty feet eight inches and five lines on the line dividing it from the property lately belonging to the late A. Vignes, and thirty-two feet five inches and one line and a half on the rear line.

Lot number eleven measures thirty-two feet seven inches and two lines front on Esplanade street by two hundred and thirty feet eight inches and six lines in depth on the line dividing it from lot number thirteen, two hundred and thirty feet one line in depth on the line dividing it from lot number ten, and thirty-two feet five inches and one line and a half on the rear line.

Lot number ten measures thirty-two feet seven inches and two lines front on Esplanade street by two hundred and thirty feet one line in depth on the line dividing it from lot number eleven, two hundred and twenty-nine feet three inches and five lines on the line dividing it from lot number seven, and thirty-two feet five inches and one-half line on the rear line.

Lot number seven measures thirty-two feet seven inches and two lines front on Esplanade street by two hundred and twenty-nine feet three inches and five lines on the line dividing it from lot number ten, two hundred and twenty-eight feet seven inches and one line on the line dividing it from lot number six, and thirty-two feet five inches and one-half line on the rear line.

And lot number six measures thirty-two feet seven inches and two lines front on Esplanade street by two hundred and twenty-eight feet seven inches and one line in depth on the line dividing it from lot number seven, and two hundred and twenty-seven feet ten inches and five lines in depth on the line dividing

it from lot number three, and thirty-two feet five inches and a half line on the rear line.

Which said property was purchased by the said New Orleans City Railroad Company from the Church of St. Louis of New Orleans by an act passed before said notary, Cuvillier, on November 22d, 1860.

3d. A certain lot or parcel of ground of irregular dimensions, together with all the buildings and improvements thereon, situate in the square bounded by Nayades, or St. Charles, Pleasant, Toledano, and Prytania streets, in the fourth district of this city, and measuring six feet front on said Nayades or St. Charles street, two hundred and eighty-six feet seven inches front on said Pleasant street, two hundred and eighty-seven feet six inches front on said Toledano street, and twenty-six feet on the rear line.

Which said property was purchased by the said New Orleans City Railroad Company from E. J. Hart by an act passed before William L. Poole, notary, on March 8th, 1861.

4th. "A." Seven lots of ground situated in the square number fourteen, which is bounded by Pleasant, Harmony, Camp, and Magazine streets, designated by the numbers one, two, three, four, five, six, and seven on a plan drawn by C. A. Hedin, surveyor, on the 27th November, 1849, and deposited as plan No. 180 in the office of Theodore Guyol, notary public, in this city. Lots numbers one, two, three, and four adjoin each other and measure each thirty feet front on Magazine street by one hundred and fifteen feet in depth between parallel lines, lot number four forming the corner of Magazine and Pleasant streets, and lots numbers five, six, and seven adjoin each other, and measure each thirty feet in front on said Pleasant street by one hundred and twenty feet in depth between parallel lines.

"B." A certain lot of ground situated in the said square number fourteen, designated by the letter A on a sketch dated the 23d of June, 1852, and annexed to an act passed before L. R. Kenny, then notary in this city, on the 25th of June, 1852. Said lot measures thirty feet front on Pleasant street between Magazine and Camp streets by a depth of one hundred and twenty feet between parallel lines, American measure, and is composed

of the rear part of lots numbers eight, nine, ten, and eleven of said square according to the above mentioned plan of C. A. Hedin.

"C." Four certain lots of ground situated in the said square number fourteen, designated by the letters "B, C, D, and E," on a sketch paraphed "*ne varietur*" and annexed to an act passed before J. F. Coffey, notary, on the 24th day of March, 1859. Said lots adjoin each other and measure each thirty feet front on Camp street by a depth of eighty-five feet between parallel lines, said lot "B" forming the corner of Camp and Pleasant streets; which said four lots of ground form the greater parts of lots designated by the numbers eight, nine, ten, and eleven on the said above-mentioned plan by C. A. Hedin.

"D." Five certain lots of ground situated in the said fourth district, in the square number thirteen, comprised within Pleasant, Magazine, Camp, and Toledano streets, designated by the numbers seven, eight, nine, ten, and eleven on a plan drawn by C. A. Hedin, dated the 21st day of February, 1849, and deposited in the office of L. R. Kenny, then notary, and measuring as follows, to-wit: Lot number seven measures twenty-nine feet one inch and one-eleventh in front on Pleasant street by a depth of one hundred and nineteen feet four inches and one-fourth lines of the line nearest to Magazine street and by a depth of one hundred and seventeen feet five inches and one line and five-elevenths on the line of lot number six.

Lots numbers eight, nine, ten, and eleven adjoin each other and measure each thirty-one feet nine inches and four lines front on Magazine street by the following depths, to-wit: Lots numbers eight, nine, and ten, each one hundred and sixteen feet four inches and four-elevenths between parallel lines, and lot number eleven, one hundred and sixteen feet four inches and four-elevenths on the line of lot number ten and one hundred and seventeen feet two inches seven and three-fourths lines on the line of Suburb Plaisance, now Toledano street, the whole American measure.

"E." Three lots of ground situated in the said square number thirteen, designated by the numbers four, five, and six on said above-mentioned plan drawn by C. A. Hedin on the 21st February,

1849, adjoining each other and measuring each twenty-nine feet one inch and one-eleventh front on said Pleasant street, twenty-nine feet three inches and five lines and nine-elevenths in width in the rear by the following depths, to-wit:

Lot number six, one hundred and fifteen feet five inches six lines and six-elevenths.

Lot number five, one hundred and thirteen feet six inches three lines and seven-elevenths, and lot number four, one hundred and eleven feet seven inches and eight-elevenths.

"F." Three certain lots of ground situated in the said square number thirteen, designated by the numbers one, two, and three on said above-mentioned plan drawn by C. A. Hedin on the 21st February, 1849, and measuring as follows, to-wit: Lot number one, forming the corner of Camp and Pleasant streets, measures twenty-nine feet one inch and one-eleventh in front on Pleasant street, one hundred and five feet nine inches deep and front on Camp street, one hundred and eight feet seven inches and ten-elevenths in depth on the line of lot number two, and twenty-nine feet three inches and five lines and nine-tenths in width in the rear.

Lot number two measures twenty-nine feet one inch and one-eleventh front on Pleasant street, one hundred and seven feet eight inches and ten-elevenths deep on the line of lot number one, one hundred and nine feet seven inches and nine-elevenths deep on the line of lot number three, and twenty-nine feet three inches and five lines and nine elevenths in width in the rear, and lot number three measures twenty-nine feet one inch and one-eleventh front on Pleasant street, one hundred and nine feet seven inches and nine-elevenths in depth on the line of lot number two, one hundred and eleven feet seven inches and eight lines on the line of lot number four, and twenty-nine feet three inches and five and nine-elevenths lines in width in the rear, American measure, together with all the buildings and improvements thereon, rights, ways, servitudes, privileges, and advantages thereunto belonging or in anywise appertaining.

Which said property was purchased by the said New Orleans City Railroad Company from Henry Hart and Frederick Wintz

by an act passed before Edward Barnett, late notary in this city, on the 20th March, 1861.

5th. A certain lot of ground situated in the fourth district of this city, designated by lot number one, of square bounded by Toledano, Pleasant, Nayades, (now St. Charles), and Prytania streets, and measuring thirty-two feet eight inches, more or less, in front on Prytania street by one hundred and fifty feet deep and front on Pleasant street, and about twenty-six feet on the rear line dividing it from lot number two, as per plan drawn by Adl. Knell, architect and civil engineer, dated the 11th October, 1851, and deposited in the office of Ant. Doriocourt, notary in this city, a sketch of which said plan is thereunto annexed for reference to the act of purchase.

Which said property was purchased by the said New Orleans City Railroad Company from Joseph Llado, by an act passed before Edward Barnett, late notary in this city, on March 20th, 1861.

6th. A certain square of ground situate, lying, and being in the third district of this city, bounded by Goodchildren, Love, Poland, and Lesseps streets, and having, English measure, two hundred and seventy-seven feet eight inches in front on Goodchildren street, the same front on Love street, three hundred and ninety-six feet three inches in front on Lesseps street, and the same front on Poland street, as per plan of Faubourg Washington, drawn by Joseph Pilié, city surveyor, under date of the 25th of February, 1832, deposited in the office of Charles Janin, late notary public in this city, on the fifth of March following, together with all the rights, privileges, and advantages thereunto belonging or in anywise appertaining.

Which said property was purchased by the said New Orleans City Railroad Company from Charles A. Barriere and Wm. S. Toole, by an act passed before Edward Barnett, late notary in this city, on March 30th, 1861.

7th. Four lots of ground adjoining each other, situate in the second district of this city, designated by the numbers one, two, three, and four, in a portion of ground bounded on both sides by the Bayou St. John and on a third side by Esplanade street, which lots of ground measure in American measure, as follows,

to-wit: Lot number one, thirty-two feet one inch five lines front on the old shell road by two hundred and twenty-six feet five inches five lines in depth on the line dividing it from Mr. Musgrove's property; lot number four, thirty-two feet one inch four lines front on the old shell road by a depth of two hundred and twenty-seven feet two inches one line on the line dividing it from lot number one, and two hundred and twenty-seven feet ten inches five lines in depth on the line dividing it from lot number five; lots numbers two and three measure each thirty-two feet seven inches two lines front on Esplanade street by a depth as follows: Lot number two, of two hundred and twenty-six feet five inches and six lines on the line dividing it from Mr. Musgrove's property; lot number three, two hundred and twenty-seven feet two inches and one line on the line dividing it from lot number two, and two hundred and twenty-seven feet ten inches and five lines on the line dividing it from lot number six. Said lots numbers one, two, three, and four are contiguous to each other on their rear lines—

Agreeably to a plan drawn by Chas. A. de Armas, dated 18th May, 1859, and deposited in the office of J. Cuvillier, notary, for reference, together with all the buildings and improvements thereon and all the rights, ways, servitudes, privileges, and advantages thereunto belonging or in anywise appertaining.

Which said property was purchased by the said New Orleans City Railroad Company from Henry Willett by an act passed before Edward Barnett, late notary in this city, on 22d September, 1854.

8th. A certain square of ground, with the improvements thereon, situate in the second district of this city and designated by the number thirty-one on a plan drawn by L. Surgi, surveyor, on the 31st December, 1849, and deposited in the office of O. H. Perry, late a notary public in this city.

Which said square is bounded by Dupre, White, Custom-House, and Bienville streets, and is subdivided into twenty-two lots.

Which said property was purchased by the said New Orleans City Railroad Company from German Society of New Orleans by an act passed before Theo. Guyol, notary, on June 13th, 1877.

9th. That portion of ground situate on the shore of Lake Pantchartrain, on the left side of the new canal, going to said lake, and in front of lots numbers ten, eleven, twelve, thirteen, fourteen, and fifteen, on a plan drawn by W. H. Williams, surveyor and engineer, on the twentieth day of April, eighteen hundred and seventy-one, and deposited in the office of Theo. Guyol, notary in this city, as plan I, the said portion of ground commencing from the line of division between lots numbered eight and nine of said plan—that is to say, at a distance of one hundred feet from the corner of Mercer street, thence extending along Lake avenue about nine hundred and ten feet to the division line between the property of the New Orleans Canal and Banking Company and that of Hazeur Brothers by a depth running to the lake, together with all the rights of accretion in front of said portion of ground and all the rights, claims, and privileges to which the said New Orleans Canal and Banking Company was entitled as front proprietors.

Which said property was purchased by the said New Orleans City Railroad Company by act before Theo. Guyol, March 9th, 1881, from said banking company.

Right of way and franchises.

1st. The right of way and franchise for the privilege of running street cars on what are known as the "Camp and Prytania line," the "Magazine line," the "Rampart and Dauphine line," the "Canal Street and Metairie Road line," the "Metairie Ridge and Bayou St. John line," and the Esplanade and Bayou Bridge line," purchased from the city of New Orleans October 2d, 1879, by act before G. Legardeur, Jr., notary public in this city, passed in accordance with ordinances Nos. 4968, 5020, and 6148, A. S., and omission supplied by ordinance 7127, A. S., adopted May 31st, 1881.

2d. The right of way and franchise for the privilege of running street cars on what is known as the extension of the "Camp and Prytania line," as per contract with the city of New Orleans, passed before Joseph D. Taylor, notary public in this city, on February 27th, 1883, passed in accordance with ordinance No. 54, council series.

3d. The right of way and franchise for the privilege of running street cars on what is known as the extension of the "Magazine line," as per contract with the city of New Orleans, passed before Joseph D. Taylor, notary public in this city, on May 15th, 1883, passed in accordance with ordinances Nos. 248 and 276, Council Series.

4th. The right of way and franchise for the privilege of running street cars on what is known as the "Levee and Barracks line," purchased from the city of New Orleans June 9th, 1862, by act before C. E. Fortier, late notary in this city, passed in accordance with ordinances Nos. 6033 and 6053, Old Series, amended by ordinances Nos. 6322 and 6405, Old Series, and 490 and 1506, New Series. (Note.—Under these ordinances this right of way exists until June 8th, 1897.)

5th. The right of way and franchise for the privilege of running street cars on what is known as the "Slaughter-House Extension," from Delery street over the Levee road or street to the Crescent City Live Stock Landing and Slaughter-House Company's premises, granted by ordinance No. 1682, A. S., adopted July 30th, 1872.

6th. The right of the exclusive use of the lake front of the revetment levee situated between the end of the New Canal and the bridge of the Upper Line canal, for the period of twenty-five years from January 27th, 1880, as per ordinance No. 6316, A. S., adopted that day.

7th. The right of use and occupancy of the buildings and other improvements erected on said lake front and which revert to the city of New Orleans at the expiration of said twenty-five years, consisting of wharf, hotel, bar-room, pavilion, music stand, machine shop, depot, etc.

8th. The right and privilege of running trains propelled by steam power from the lake to the stand now established on Canal and Carondelet streets, derived from ordinances of the city of New Orleans No. 3565, adopted June 13th, 1876, and No. 3617, adopted August 22d, 1876; No. 6528, adopted June 15th, 1880, and No. 6891, adopted March 3d, 1881.

(Note.—These last three ordinances are to be construed together, and as the right to run said steam trains on Canal

street, between Basin and Carondelet streets, is now in contest, the transfer of this right is made without warranty. See F. W. Tilton *et als. vs.* New Orleans City Railroad Company, No. 8613, Supreme Court of Louisiana.)

Also from contract with the city, passed before G. LeGardeur, notary, on July 1st, 1878, and from act of consolidation with the New Orleans, Metairie and Lake Railroad Company, of date December 21st, 1875, and January 12th, 1876, deposited with the secretary of state January 24th, 1876, said New Orleans, Metairie and Lake Railroad Company being incorporated by act of the Legislature No. 133, approved April 20th, 1869.

Rolling stock, live stock, etc.

1st. Six hundred and forty-five mules.

2d. Twenty-seven ponies.

3d. One hundred and forty-eight cars.

4th. Nine engines.

5th. Forty coaches.

6th. Seven floats, twelve carts, one dray, two baggage cars, three wagons, and two flat cars.

7th. Feed and harness.

8th. Contents of blacksmith, harness, and machine shops at Magazine, Canal, Bayou Road, and Poland stations.

9th. Machinery for electric light at West End.

10th. Furniture at West End Hotel, and office furniture, iron safes, stationery, etc., at 102 Canal street, second floor.

Road-bed.

Track aggregating about fifty miles, including cross-ties, stringers, tie-rods, rails, etc., running on the following streets:

1st. "Magazine line."—Double track on Canal street from Exchange Place to Camp street, and on Magazine street, from Toledano street to St. Andrew street; single track on Camp and Magazine streets, from Canal street to St. Andrew street, and on Canal street, from Magazine street to Camp street.

2d. "Prytania line."—Double track on Prytania street from its junction with Camp street to Upper Line street, on Upper Line street, from Prytania street to Pitt street, on Pitt street, from Soniat street to Upper Line street, on Dufossat street, from St. Charles street to Boudousquie street; single track on Pitt and Boudous-

quie, from Soniat to Dufossat, and on Soniat and Dufossat, from Boudousquie to Pitt street.

3d. "Rampart and Dauphine line." Double track on Rampart street, from Canal street to Esplanade street, on Poland street from Dauphine street to Rampart street, on Dauphine street, from Poland street to Delery street, on Levee, from Delery street to Slaughterhouse; and single track on Dauphine street, from Esplanade street to Poland street, and on Rampart street between same streets.

4th. "Canal street and Metairie Road line."—Double track on Canal street, from St. Charles street to Metairie road.

5th. "Metairie Road and Bayou St. John line."—Double track on Metairie Ridge, from new canal to Carondelet canal or Bayou St. John.

6th. "Esplanade and Bayou Bridge line."—Double track on Esplanade street, from Rampart street to Bayou St. John.

7th. "Esplanade and French Market line."—Double track on Esplanade street, from Levee street to Victory street, and from Bourbon street to Rampart street.

8th. "Levee and Barracks line."—Double track on Canal street, from Decatur street to North Peters street, on North Peters street, from Canal street to Enghein street, Enghein street, from North Peters to Chartres street, Poland street, from Dauphine street to Royal street; single track on Chartres street, from Enghein street to Poland street, on Poland and Enghein streets, from Royal to Chartres street, Royal street, from Poland street to Enghein street.

9th. "West End line."—Double track along the New Canal from end of Canal Street line to Lake.

10th. And all the switches, turnouts, turn-tables, connections, extra tracks, etc., used or belonging to any of the above lines.

This sale and transfer is made and accepted for and in consideration of the price and sum of one million four hundred thousand dollars, represented by fourteen thousand shares of the capital stock of the New Orleans City and Lake Railroad Company of the par value of one hundred dollars each, which have been delivered to the liquidating commissioners of the New Orleans City Railroad Company, who, in the name of the stock-

holders thereof, grant full acquittance and discharge therefor to the present purchaser.

And in accordance with articles IV and V of its charter and as a further consideration of the sale herein made the said New Orleans City and Lake Railroad Company hereby assumes all the obligations and contracts of the said New Orleans City Railroad Company, whether the same relate to individuals, other private corporations, the City of New Orleans, or the State of Louisiana, and it binds itself, its successors and assigns, to fully discharge and execute same.

And it further obligates itself to pay and and liquidate all the bonded, judgment and floating debt of said New Orleans City Railroad Company, as hereinafter set forth.

1st. "Bonded debt," amounting to seven hundred thousand dollars, fully set forth and described in an act of mortgage, dated December 1st, 1879, granted by said company to Joseph A. Walker, before N. B. Trist, notary public in this city, and recorded in the mortgage office of this parish, in Book 176, folio 611; and said purchaser hereby binds itself, its successors and assigns, not to alienate nor encumber the property herein conveyed to the prejudice of said mortgage, which, as well as the contract amendatory thereof, passed before same notary on March 11th, 1880, is hereby expressly assumed; and in this connection said commissioners hereby transfer to said purchaser the deposit in the Canal Bank of this City to the credit of said bonded debt, made in accordance with said contract, now amounting to the sum of twenty thousand two hundred and seventy-four dollars and eighty cents; and they also transfer all other cash of said New Orleans City Railroad Company, whether in bank or on hand, the receipt of which is hereby acknowledged by the representatives of the purchaser, and a statement of the amount thereof dispensed with.

2d. "Judgment debt."—"A." City of New Orleans *vs.* New Orleans City Railroad Company, No. 1247, division "C" of the civil district court for the parish of Orleans. Judgment for $11,239.20, with ten per cent. per annum interest from March 31st, 1881, and costs, being for city taxes for 1881 on the franchises of the company, assessed at $630,000.

"B." William Mattle *vs.* New Orleans City Railroad Company *et al.*, No. 4596 of same court. Judgment for $1,000, with legal interest from December 1st, 1881, and costs, being for damages claimed for expulsion from car. Now pending on appeal in supreme court of Louisiana.

"C." Caroline M. Schiller *vs.* New Orleans City Railroad Company, No. 5877 of same court. Judgment for $2,691.16, with legal interest from April 27th, 1882, and costs, being for value of stock unlawfully transferred. Has been appealed, and propositions of compromise now pending.

"D." Ophelia E. Schiller, wife of W. H. Rolling *vs.* New Orleans City Railroad Company, No. 5874 of same court. Judgment for $1,269.33⅓, with nine per cent. back dividends and costs; similar to claim above. Propositions of compromise pending; possibility of appeal by plaintiff.

"E." Mary E. Schiller, wife of O. A. Fairex *vs.* New Orleans City Railroad Company, No. 8144 of same court; same judgment as above and in same condition.

3d. "Floating debt."—"A." Claim of City of New Orleans for taxes of 1882 on the franchises of the company, assessed at $630,000, amounting to twenty thousand and three dollars, with ten per cent. per anuum interest from March 31st, 1882, till paid, and costs, as per suit No. 3548, division "B" of the civil district court for the parish of Orleans.

"B." Claim of Charles E. B. de La Brettonne and wife for twenty-five thousand dollars, resulting from injury to and death of minor child, as per suit No. 6842, division "B," civil district court for the parish of Orleans.

"C." Claim of Mrs. Mary Parish for ten thousand dollars, resulting from alleged injuries caused by premature starting of car, as per suit No. 8091, division "D," civil district court for the parish of Orleans.

"D." Claim of Crescent City Railroad Company for twenty-five thousand dollars damages, alleged to have been caused by the illegal issuance of an injunction, as per suit No. 8421, division "E," civil district court for the parish of Orleans.

(NOTE.—The above suits are now pending and undetermined, and in all of them the New Orleans Railroad Company, through

its attorneys, filed proper defenses, and no liability is admitted to exist as to any of them, either by the present vendor or the present purchaser, it being the true meaning and intent of this assumption that the New Orleans City and Lake Railroad Company binds itself in no other manner than to satisfy whatever final judgments may be rendered in said suits against it by reason of its hereby becoming defendant therein.)

"E." And whatever "floating debt proper" said New Orleans City Railroad Company may have the present purchaser assumes and dispenses with a detailed statement thereof.

The said purchaser moreover binds itself to carry out all valid existing contracts for the employment or hire of all clerks and other agents, including the musicians engaged for the season at "West End," among whom is embraced Liberati, the cornetist.

The present purchaser is hereby subrogated to all the rights of said New Orleans City Railroad Company existing under any and all contracts heretofore made not herein specially mentioned (should any such be omitted therefrom), and particularly as to the following two:

1st. Contract and agreement with the St. Charles Street Railroad Company for the use of its tracks and road-bed on Esplanade street, between Bourbon and Victory streets, in this city, as per act before W. J. Castell, notary in this city, May 23d, 1874.

2d. Contract and agreement with the Firemen's Charitable Association for a twenty-five years' lease, from January 1st, 1876, of that portion of Greenwood Cemetery through which the West End trains now run, and fully described in the act of lease of same, passed before Wm. B. Kleinpeter, late notary in this city, February 8th, 1876.

All the obligations of the above acts are assumed by the present purchaser.

By reference to the annexed certificate of the register of conveyances in and for this parish and city, dated this day, it will appear that the real estate herein sold has not been previously alienated.

And by reference to the annexed certificate of the recorder of mortgages in and for this parish and city, dated May 28th, 1883, said real estate appears free of all encumbrances, except inscrip-

tions of the drainage privilege and the aforesaid mortgage of $700,000.

The purchaser assumes payment of any drainage tax that may be legally due and unpaid.

Proper tax receipts have been produced unto me, notary, showing the payment of all taxes due the State of Louisiana and the city of New Orleans, except those claimed by the latter for 1881 and 1882 on the assessed value of the franchises of the New Orleans City Railroad Company, which, subject to the qualifications above set forth, are assumed by the present purchaser, as are also all taxes exigible the current year and based upon the assessments made against the property herein sold as belonging to the New Orleans City Railroad Company.

And said New Orleans City Railroad Company, having, according to law, paid its State and city licenses for 1883, amounting to twenty-five hundred dollars each, hereby transfers the unexpired term thereof, extending to December 31st, 1883, to the present purchaser, the New Orleans City and Lake Railroad Company.

Thus done and passed in the presence of Joseph A. Dare and William S. Ingram, competent witnesses, both of this city, who hereto sign with said parties and me, the notary.

(Original signed) ALBERT BALDWIN.
H. GALLY.
CHAS. E. BLACK.
I. L. LYONS.
B. W. TAYLOR.
R. M. O'BRIEN.
J. A. WALKER.
W. E. LEVERICH.
JOS. A. DARE.
W. S. INGRAM.
W. O. HART.
Notary Public.

I hereby certify the above and foregoing to be a true and correct copy of the original act, on file and of record in my office.

W. O. HART,
Notary Public.

EXHIBIT "D"

Agreement with City of New Orleans.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans, City of New Orleans.

Be it known that on this first day of the month of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and second, before me, Gustave Le Gardeur, Jr., a notary public, duly commissioned and sworn, in and for the parish and city aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared the Hon. Edward Pilsbury, mayor of the city of New Orleans, herein duly authorized in the full execution of these presents, under and by virtue of resolution No. 4566, administration series, adopted by the city council June 20th, 1878, a certified copy whereof is hereto annexed for reference.

And also came and appeared Frederick Wintz, of this city, herein acting as president of the New Orleans City Railroad Company, by virtue of a resolution adopted by the board of directors of the said company on the first day of July, 1878, a certified copy whereof is hereto annexed for reference, which said appearers, in their respective capacity and herein duly authorized as aforesaid, declared that they have covenanted and agreed, and do by these presents covenant and agree and bind the said city of New Orleans and the said railroad company, the one unto the other, as follows, to-wit:

1°. The said New Orleans City Railroad Company, through its president aforesaid, does hereby agree and bind itself to reduce the fare on said road to fifteen cents for the round trip from its station at Canal street at the intersection of Carondelet and Bourbon streets to the New Lake and return from and after the date hereof.

2°. The said railroad company, through its president aforesaid, hereby binds itself to cause to be built, at its own expense, a number of sheds on the levee at the New Lake end for the convenience of visitors; the number and character of the sheds to be determined hereafter.

3°. The said railroad company, through its president aforesaid, does, moreover, by these presents bind itself to advance the necessary money to repair the revetment levee at said New Lake end.

And now, for the reimbursement to the said railroad company of the sum of money so to be advanced by the said company for repairing the said levee, it is well understood and agreed by and between the said parties hereto that the same shall be payable in two equal installments, on the first day of March in 1879 and 1880, without interest, and the said Mayor Pilsbury declared that, by virtue of the power in him vested by said resolution No. 4566, administration series, he does by these presents bind the city of New Orleans to issue and deliver to said company for each installment of the indebtedness which it, the city, may incur as aforesaid to said company receipts duly acquitted and receipted for an equal amount of municipal licenses due and owing by the said company to the city and taxes imposed for general purposes for the years in which said installments shall mature, it being the true intendment and meaning of the said resolution No. 4566, administration series, and of these presents that, in consideration of the other obligations herein assumed by the said New Orleans Railroad Company and of the advances to be made by the said company of the funds necessary to repair the revetment levee as hereinbefore set forth, the said company is to be relieved, freed, and exempted from the payment to the city of New Orleans of the taxes and licenses which otherwise would become due and owing by it to the city in the years 1879 and 1880 to the extent of the amount advanced by the said company.

Thus done and passed in New Orleans, at my office, the day, month, and year first above written, in the presence of Armand Pitot, Jr., and Gustave M. Letellier, competent witnesses, who have signed with the said parties and me, notary, after reading the whole.

(Original signed)

E. PILSBURY, *Mayor.*
F. WINTZ, *President.*
A. PITOT, JR.
G. M. LETELLIER.
G. LE GARDEUR, JR,
Notary Public.

A true copy of the original on file and of record in my office. New Orleans, April 10th, 1879.

G. LE GARDEUR, JR.,
Notary Public.

Ordinance No. 4566, administration series.

Resolved, That the mayor be, and is hereby, authorized to enter into a contract with the New Orleans City Railroad Company whereby said company shall agree to reduce the fare on said road to fifteen (15) cents for the round trip from the station at Canal street to the New Lake and return, and shall, at its own expense, cause a number of sheds to be built on the levee at the New Lake end for the convenience of visitors, the number and character of the sheds to be determined hereafter, and whereby said company shall engage to advance the necessary money to repair the revetment levee at said New Lake end; and for the reimbursement to said company of the said sum of money so to be advanced for repairing said levee it shall be stipulated and agreed that the same shall be payable in two equal installments, on the first day of March in 1879 and 1880, without interest, and that the city of New Orleans shall receive from said company for each installment of the indebtedness it may incur as aforesaid to said company an equal amount of municipal licenses due and owing by the company to the city and taxes imposed for general purposes for the years in which said installments shall mature.

(Approved June 20th, 1878.)

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 119.

NEW ORLEANS CITY AND LAKE RAILROAD CO.,
PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

Supplemental brief on behalf of City of New Orleans, defendant in error.

W. B. SOMMERVILLE,
Assistant City Attorney of New Orleans.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

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THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

Supplemental brief on behalf of City of New Orleans, defendant in error.

In the supplemental brief filed in this case, counsel for plaintiff in error shifts ground, and ~~seeks to~~ invokes the opinion of the court rendered in the case of Gordon *vs.* Appeal Tax Court, 3 How., 133, in favor of the railroad company.

Mr. Justice Wayne was the organ of the court in the Gordon case. In referring to that opinion afterwards, ~~the learned~~ Strong judge, ~~himself~~, remarked:

"That case has not been well understood. The circumstances were peculiar, and the decision rendered should be considered with reference to the peculiar facts which appeared in it. What was, in fact, decided we had occasion to observe in People *vs.* The Commissioners, 4 Wall., 244,

where Mr. Justice Nelson directed attention to the circumstances that more or less controlled the judgment."

Farrington *vs.* Tennessee, 95 U. S., 694.

The Gordon case appears to be still misunderstood, when counsel alleges on page 3 of the supplemental brief, "*The point clearly and distinctly arose whether a franchise, for which a price was paid, could be taxed without impairing the obligation of the contract.*"

No such question, it is submitted, was presented to the court for adjudication in that case.

The court states the proposition submitted, in the opinion, thus:

"The question, however, which this court is called upon to decide, *and to which our decision will be confined*, is, Are the *shareholders* in the old and the new banks liable to be taxed, under the act of 1841, on account of the stock which they own in the banks?"

Gordon *vs.* Appeal Tax Court, 3 How., 145.

Those portions of the opinion quoted in the brief, and relied upon by counsel are, it is submitted, mere *obiter dicta*. The Gordon case, as appears by the record, was a suit instituted by certain stockholders to prevent the enforced collection of taxes assessed upon their shares of stock in the banks named, on the ground that those shares were, by express contract stipulations, exempt from taxation. The banks were not parties to the suit, and the question, as to whether the franchises of the banks could be taxed was not before the court.

Turning to 4 Wall., 259, People *vs.* Commissioners, it will be found, as indicated by Mr. Justice Wayne, that Mr. Justice Nelson, as the organ of the court, interpreting the decision in the Gordon case, says:

"It was supposed on the argument that this principle was in conflict with that which governed the decision of this court in the case of Gordon *vs.* The Appeal Tax Court, but this is a mistake. That case turned upon the construction of an act of Maryland *exempting the bank from taxation* on account of a large bonus to the State for the extension of the charter. This court held that upon a true construction of the act *the stockholders were within the scope of the exemption.* The court say: 'In whatever way we examine the acts of 1813 and 1821 we are of opinion that it appears from the eleventh section in those acts to have been the intention of the legislatures which passed them to exempt the *stockholders* from taxation as persons on account of the stock which they owned in the banks.'"

The court has repeatedly had occasion to advert to the decision in the Gordon case, and it has clearly construed the extent of the same. With reference thereto Mr. Justice Wayne himself, ~~again,~~ says, in the case of Jefferson Branch Bank *vs.* Skelly, 1 Black, 446:

"This court has also decided that the charter of a bank is a franchise, which is not taxable as such if a price has been paid for it which the legislature has accepted *with a declaration that it was to be in lieu of all other taxation.* Gordon *vs.* Appeal Tax Court, 3 How., 133. The rule of construction in such a case is that the grant of privileges and exemptions to a corporation are to be strictly construed against the corporators and in favor of the public; that nothing passes but what has been granted in clear and explicit terms, and that neither the right of taxation nor any other power of sovereignty will be held by this court to have been surrendered unless such surrender has been expressed in terms too plain to be mistaken."

Mr. Justice Wayne here says distinctly, that the decision in the Gordon case is based upon the fact that a price had been paid for the franchises by each of the banks, and that the State of Maryland had declared, in very plain language,

that the price received "*was to be in lieu of all other taxation.*" The decision is based on that specific declaration.

There is no such declaration, or any declaration whatever, on the subject of exemption from taxation found in the contract under discussion in this case.

As to what questions were presented to the court in the Gordon case reference is made to the dissenting opinion of Mr. Justice Catron, in State Bank of Ohio *vs.* Knoop, 16 How., 401, where it will be found that his statement of what was before the court for consideration and decision is quite at variance with the position assumed by counsel for plaintiff in error herein. Says the learned judge:

"The next case is Gordon's case, 3 How., 133. What questions were there presented on the part of the State of Maryland do not appear in the report of the case, but I have turned to them in the record to see how they were made in the State courts. They are as follows:

"'1st. That at the time of passing the general assessment law of 1841 there was no contract existing between the State and the banks or any of them, or the stockholders therein or any of them, by which any of the banks or stockholders can claim an exemption from the taxation imposed upon them by the said act of 1841.

"'2d. That the contract between the State and the old banks, if there be any contract, extends only to an exemption from further "taxes or burdens" of the corporate privileges of banking, and does not exempt the property, either real or personal, of said banks or the individual stockholders therein.

"'3d. That even if the contract should be construed to exempt the real and personal property of the old banks and the property of the stockholders therein, yet such exemption does not extend to the new banks or those chartered since 1830, and, moreover, that the power of revocation, in certain cases in these charters, reserves to the State the power of passing the general assessment law.

"'4th. That the imposition of a tax of 20 cents upon every

one hundred dollars' worth of property upon both the old and new banks under the said assessment law is neither unequal nor oppressive nor in violation of the bill of rights.

"'5th. That taxation upon property within the State, wherever the owners may reside, is not against the bill of rights.'

"On these legal propositions the opinion here given sets out by declaring that, 'The question, however, which this court is called on to decide, and to which our decision will be confined, is, Are the shareholders in the old and new banks liable to be taxed under the act of 1841 on account of the stock which they own in the banks?' * * *

"As the case came up from the supreme court of Maryland, this court had power merely to re-examine the questions raised in the court below and decided there. All that is asserted in the opinion beyond this is outside of the case of which this court had jurisdiction, and is only so far to be respected as it is sustained by sound reasoning; but its *dicta* are not binding as authority."

The questions propounded in the Gordon case, as quoted by Mr. Justice Catron, conclusively show that it was admitted by all the parties to that litigation that the *franchises* of certain Maryland banks were exempted from taxation by the very terms of their charters, or contracts, wherein they agreed, for such consideration, to make large public improvements in the State. The franchises were not sought to be taxed in the general assessment law of 1841. That act sought to tax the shareholders only.

In the present case, the contract between plaintiff and defendant in error is silent on the subject of taxation, and the city of New Orleans denies the alleged exemption from taxation of the franchise of the plaintiff company.

It follows, then, it is submitted, that the law, as expounded in the Gordon case, does not cover the instant one, and that those parts of that decision quoted and relied

exclusively upon by plaintiff in error have no application whatever to this case.

So far as that case goes it is not authority on the question now presented to the court, except it be taken with the explanations and limitations placed thereon in subsequent opinions of the court.

The contract betweeen the city and the railroad company contains no agreement to the effect that the price paid for the franchise shall be in lieu of taxation to any extent whatever. *The faith of the city is not therein pledged not to impose any further tax or burden upon the company during the continuance of its contract,* as was done by the State of Maryland in favor of the banks. (3 How., 134.)

And, as has been shown in the original brief, at page 10, filed herein on behalf of defendant in error, the city was incompetent, under the constitution and the settled jurisprudence of the State of Louisiana, to make a contract exempting from or commuting taxes.

In addition to the cases noted in the original brief of the city, reference is made to the following authorities on this point: City *vs.* Louisiana Savings Bank, 31 La. Ann. R., 827; State *vs.* Same, 32 La. Ann. R., 1137; 27 La. Ann. R., 376, 646, and 648; 28 La. Ann. R., 512; 31 La. Ann. R., 519 and 637; 36 La. Ann. R., 432.

It is therefore submitted, in the language of the court in Erie Railroad Co. *vs.* Pennsylvania, 21 Wall., 497, that—

"The supreme court of that State has held that this 'company was doing business in the State in the sense of the act.' This construction of a State statute by the supreme court of the State, involving no question under the laws or Constitution of the United States, is conclusive upon us. We accept the construction of State statutes by the State

courts, although we may doubt the correctness of such construction. We accept and adopt it, although we may have already accepted and adopted a different construction of a similar statute of another State in deference to the supreme court of that State. * * *

"It has been held many times in this court that a State may make a valid contract that a corporation or its property within its territory shall be exempt from taxation or shall be subject to a limited and specified taxation.

"The court has, however, in the most emphatic terms, declared that the language in which the surrender is made must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no other or further liability to taxation. A State cannot strip itself of this most essential power by doubtful words. It cannot, by ambiguous language, be deprived of the highest attribute of sovereignty. This principle is distinctly laid down in each of the cases referred to. It has never been departed from."

The suggestion of counsel for plaintiff in error, that the legislature may at some time in the future impose such heavy licenses as to indirectly deprive the company of the value of its purchase, is answered by Mr. Chief Justice Marshall, as the organ of the court, in Providence Bank *vs.* Billings, 4 Peters, 563. Say the court:

"The Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments."

In the same case the court say further, in discussing the proposition, that—

"A power which is in itself capable of being exerted to the total destruction of the grant is inconsistent with the grant, and is therefore impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth it may be supposed universal; but it is not universal, and therefore its truth cannot be admitted in these broad terms in any case. We must look for the exemption in the language of the in-

strument, and if we do not find it there it would be going very far to insert it by construction."

4 Peters, 562.

And again say the court:

"The powers of sovereignty confided to the legislative body of a State are undoubtedly a trust committed to them to be executed to the best of their judgment for the public good, and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body unless they are authorized to do so by the constitution under which they are elected. They cannot, therefore, by contract deprive a future legislature of the power of imposing any tax it may deem necessary for the public service, or of exercising any other act of sovereignty confided to the legislative body, unless the power to make such a contract is conferred upon them by the constitution of the State. *And in every controversy on this subject the question must depend on the constitution of the State and the extent of the power thereby conferred on the legislative body.*"

Ohio Life Insurance and Trust Company *vs.* Debolt, 16 How., 431.

When the foregoing test is applied to the pretension of plaintiff in error it is found, that the constitution of the State of Louisiana not only does not confer the right upon the legislature, but it absolutely forbids the making of such a contract as is contended for by plaintiff in error. There can therefore be no valid law or contract passed in Louisiana, since the adoption of the constitution of 1868, which exempts from or commutes taxes.

In the case of Railway Company *vs.* Philadelphia, 101 U. S., 528, the question of the inviolability of a contract made between the State of Pennsylvania and a certain street railroad company arose.

It was contended by the company that the provision in its charter which said that it should pay "such license fee for each car run by the company as is *now* paid by other passenger railway companies" was a binding contract to pay $30 per car, and no more; and that the subsequent attempt of the Philadelphia authorities to make it pay $50 per car was in violation of that contract.

Say the court, in pronouncing its decision:

"It is clear that the right of the State to impose such a tax, rate, or imposition in the future cannot be taken away by mere implication arising from a direction to pay a certain sum, the universal rule being that it requires some plainer negative of the power of the State to levy moneys for public purposes than is found in such a direction."

This decision is exactly in point. Even if the constitution of Louisiana did not prohibit exemption from or commutation of taxes, the council of the city of New Orleans could not in 1879 take away from the legislature of the State, and future councils, the right of taxation, by directing the plaintiff in error to pay a certain sum for its franchise.

The proposition was again, and more directly, presented to the Court in the case of Memphis Gas Co. *vs.* Shelby County, 109 U. S., 398. This case is largely quoted from on page 5 of the original brief of defendant in error. It is entirely applicable to the case at bar, and it definitely settles the point adversely to plaintiff in error.

An examination of the transcript of record and the briefs filed in that case shows that the court had before it all of the law on this vexed question, and particularly the decision in the Gordon case. Counsel for the Memphis Gas Company

contended that the company had given consideration for the franchise of operating gas works and vending gas, and had contract rights which were protected by the National Constitution, and that the imposition of a license tax for the privilege of carrying on the business was in violation of those rights.

The court, with all of the law on the subject before it, and after giving the matter proper consideration, clearly decided, as has been shown, that a franchise granted by a State to a corporation to do or perform certain acts does not carry exemption from license taxation with it.

The syllabus to that case announces the following legal finding:

"The legislative grant of a privilege to erect, establish, and construct gas works and make and vend gas in a municipality for a term of years does not exempt the grantees from the imposition of a license tax for the use of the privilege conferred."

109 U. S., 398.

Whether the plaintiff in error paid a large or small amount for its franchise, or whether it paid any bonus, is immaterial to the legal proposition submitted.

Say the court on this point:

"Much stress was laid in the argument, and in the decisions of the supreme court, on the fact that the banks paid no bonus for their charters, and that no contract can be binding which is not mutual.

"This is a matter which can have no influence in deciding the legal question."

State Bank of Ohio *vs.* Knoop, 16 How., 390.

The decision of the supreme court of Louisiana in this case follows the decisions of this Court, and it ought to be affirmed.

Respectfully submitted,

W. B. SOMMERVILLE,

Assistant City Attorney of New Orleans.